DOCKET

No. 83-1266-CFX Title: United States, Petitioner
Status: GRANTED v.
Robert W. Boyle, Executor of the Estate of Myra W. Boyle, Deceased

Docketed:
January 30, 1984 Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Elliff, Nathan T., Davies, Thomas E.

Entry	Date	Note	Proceedings and Orders
1	Dec 30 1983		Application for extension of time to file petition and order granting same until January 29, 1984 (Stevens, December 30, 1983).
2	Jan 30 1984	G	Petition for writ of certiorari filed.
3	Mar 3 1984		Brief of respondent Boyle, Robert W., etc. in opposition filed.
4	Mar 7 1984		DISTRIBUTED. March 23, 1984
5	Mar 26 1984		Petition GRANTED.
7	May 10 1984		Order extending time to file brief of petitioner on the merits until June 9, 1984.
8	Jun 9 1984		Joint appendix filed.
9	Jun 15 1984		Brief of petitioner United States filed.
10	Jun 25 1984		Record filed.
11	Jun 25 1984		Certified original record 8 C.A. proceedings received.
12	Jun 25 1984		Record filed.
13	Jun 25 1984		Certified original record, 4 volumes, received.
14	Jul 11 1984		Brief of respondent Robert W. Boyle, etc. filed.
15	Aug 8 1984		CIRCULATED.
16	Aug 10 1984		SET FOR ARGUMENT. Wednesday, October 10, 1984. (4th case)
17	Oct 2 1984	X	Reply brief of petitioner United States filed.
18	Oct 10 1984		ARGUED.

PETITION FOR WRIT OF CERTIORARI

83 - 1266

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT W. BOYLE, EXECUTOR OF THE ESTATE OF MYRA W. BOYLE, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Section 6651(a)(1) of the Internal Revenue Code imposes a penalty for failure to file a tax return on time, "unless it is shown that such failure is due to reasonable cause and not due to willful neglect." The question presented is whether a taxpayer's reliance on an attorney to prepare a tax return for him constitutes "reasonable cause" sufficient to defeat the late-filing penalty, where the return is filed late in part because of the attorney's negligence.

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UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT W. BOYLE, EXECUTOR OF THE ESTATE OF MYRA W. BOYLE, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-16a) is reported at 710 F.2d 1251. The opinion of the district court (App. D, *infra*, 21a-24a) is unofficially reported at 49 A.F.T.R.2d 82-1507.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 17a-18a) was entered on June 24, 1983. A petition for rehearing was denied on October 11, 1983 (App. C, *infra*, 19a-20a). On December 30, 1983, Justice Stevens extended the time within which to petition for a writ of certiorari to and including January 29, 1984 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Sections 6018, 6075, and 6651 of the Internal Revenue Code of 1954 (26 U.S.C.) are set out in a statutory appendix (App. E, *infra*, 25a-26a).

STATEMENT

1. Myra W. Boyle died on September 14, 1978. Her will appointed her son, respondent Robert W. Boyle, as executor of her estate. Respondent was 64 years old at the time of his appointment and was then employed as an engineer at a nuclear power plant (App. A, *infra*, 13a; R. Doc. 6, Ex. A).[1] Respondent had previously served as executor of his father's estate and, for many years, had been the president of an earth-moving company that employed 20 persons (App. A, *infra*, 2a n.2, 12a-13a). As president of that company, respondent had regularly signed corporate tax returns (*ibid.*).

Shortly after his mother's death, respondent retained Ronald Keyser of the law firm of Eliff, Keyser & Hallberg to serve as attorney for the estate (App. A, *infra*, 2a). Keyser had practiced law for 20 years, specializing in real estate and probate law (*ibid.*). In discussing respondent's duties as executor, Keyser advised that the estate would be required to file a federal estate tax return pursuant to Section 6018(a)(1) of the Code.[2] That Section provides that "the executor shall make a return with respect to the estate tax" if the gross estate exceeds a specified dollar amount. Although respondent was told that a return had to be filed, he was not informed (nor did he inquire) as to its due date, leaving its preparation entirely up to Keyser (App. A, *infra*, 2a).

[1] "R. Doc." refers to documents contained in the original record on appeal, as numbered by the clerk of the district court.

[2] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C), as amended ("the Code" or "I.R.C.").

Section 6075(a) provides that an estate tax return "shall be filed within 9 months after the date of the decedent's death." Since Myra Boyle died on September 14, 1978, respondent as executor was required to file an estate tax return on or before June 14, 1979. The return, however, was not filed until September 13, 1979, some three months late (App. A, *infra*, 22a). Keyser testified that the practice in his law office was to "post" the due date for a return on a "master calender" so that the responsible attorney could be alerted at least ten days before the filing deadline (R. Doc. 6, Ex. B). Keyser testified that the Boyle estate "was not listed upon said calendar and [that] the reason for [its omission therefrom was] unknown to [him] or anyone else in [his] law firm" (*ibid.*). Respondent did not ask Keyser about the status of the return until September 6, 1979, by which time the return was already 11 weeks overdue (App. A, *infra*, 3a).

2. Section 6651(a)(1) imposes an "[a]ddition to the tax," commonly referred to as a "penalty," for failure to file a tax return (including an estate tax return) on time. The penalty is 5% of the amount "required to be shown as tax on such return" for each month the return is delinquent, up to a maximum of 25% in the aggregate. The penalty is applicable unless the taxpayer demonstrates that his failure to file on time was "due to reasonable cause and not due to willful neglect" (*ibid.*). A delay is due to reasonable cause "[i]f the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time." Treas. Reg. § 301.6651-1(c)(1).

The Commissioner determined that respondent had not shown "reasonable cause" for filing the return late and accordingly asserted a penalty against the estate, in the amount of $17,124, under Section 6651(a)(1).[3] Re-

[3] The Commissioner also assessed the estate $1,326 in interest, at the then-prevailing annual rate of 6%, for the three-month period during which the estate tax payment was over-

spondent paid the penalty and sued for a refund in the United States District Court for the Central District of Illinois, alleging that he had relied on Keyser to file a timely estate tax return and that such reliance constituted "reasonable cause" for the late filing (App. D, *infra*, 22a-23a). The district court, on cross-motions for summary judgment, accepted respondent's argument, citing the Seventh Circuit's previous decision in *Rohrabaugh* v. *United States*, 611 F.2d 211 (1979).

3. A divided panel of the Seventh Circuit affirmed (App. A, *infra*, 1a-16a). The majority adhered to the standard set forth in *Rohrabaugh*, under which reliance on counsel constitutes "reasonable cause" for the late filing of a tax return if (App. A, *infra*, 4a):

> (1) the taxpayer is unfamiliar with the tax law; (2) the taxpayer makes full disclosure of all relevant facts to the attorney or accountant * * *; and (3) the taxpayer has exercised ordinary business care and prudence.

Emphasizing that this was a facts-and-circumstances test, the court held that respondent had shown "reasonable cause." It noted that, while Boyle had business experience, his experience "did not encompass the preparation or filing of tax returns and therefore would not support any inference that he, in fact, knew the filing deadline" (App. A, *infra*, 4a). It found that respondent had made full disclosure to the estate's attorney. And it held that respondent had exercised "ordinary business care and prudence" in hiring competent counsel, in maintaining contact with the attorney rather than "simply abandon[ing] the estate once he had delegated the legal functions" (*id.* at 4a-5a), and in taking steps to ensure that the return was filed promptly after learning

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due. See I.R.C. § 6601(a); 26 U.S.C. (Supp. V) 6621(b); Rev. Rul. 77-411, 1977-2 C.B. 480. Respondent did not contest the estate's liability for interest, and no question as to that liability is presented here.

that the filing deadline had lapsed (*id.* at 5a). The court acknowledged that its holding conflicted with decisions of the Fifth, Eighth, and Ninth Circuits, each of which "ha[d] unequivocally adopted a per se rule that reliance on counsel is not 'reasonable cause' within the meaning of [I.R.C.] § 6651(a)(1)." App. A, *infra*, 5a, citing *Millette & Associates, Inc.* v. *Commissioner*, 594 F.2d 121 (5th Cir.), cert. denied, 444 U.S. 899 (1979); *Estate of Lillehei* v. *Commissioner*, 638 F.2d 65 (8th Cir. 1981); *Ferrando* v. *United States*, 245 F.2d 582 (9th Cir. 1967).

Judge Posner dissented (App. A, *infra*, 12a-16a). He emphasized that respondent "knew he had to file an estate tax return [and] must have known that the return was due within a fixed period of time after the decedent's death—that it could not be filed whenever he took a fancy to file it" (*id.* at 13a). Under these circumstances, Judge Posner believed, "ordinary business care and prudence" required that a fiduciary of respondent's business experience at least ask his attorney what the filing deadline was (*id.* at 15a). If respondent were to pay the penalty, Judge Posner noted, he would almost certainly have a claim for reimbursement against his lawyer, "whose admitted negligence was the primary cause of the late filing" (*id.* at 16a). But instead of creating incentives for timely filing by shifting liability to the person who was at fault, the majority improperly "adopt[ed] an approach that rewards both the active negligence of the lawyer and the passive negligence of his client" (*ibid.*).

The government's petition for rehearing was denied, with Judges Posner and Cudahy voting for rehearing en banc.

REASONS FOR GRANTING THE PETITION

The court of appeals has decided an important question of federal tax law in a way that conflicts with the decisions of at least three other circuits. The decision

below is erroneous, permitting taxpayers to secure immunity from the late-filing penalty even though their returns are negligently filed late. The question recurs frequently, as evidenced by the large number of decided cases, and involves substantial amounts of revenue. Review by this Court is therefore appropriate.

1. As the Seventh Circuit acknowledged, the decision below squarely conflicts with the holdings of at least three other courts of appeals. In *Millette & Associates*, the Fifth Circuit held that "reliance on tax advisors is not reasonable cause for failure to file a return on time; the responsibility for assuring a timely filing is the taxpayer's." 594 F.2d at 124-125. Accord, *e.g.*, *Logan Lumber Co.* v. *Commissioner*, 365 F.2d 846, 854 (5th Cir. 1966); *Dritz* v. *Commissioner*, 28 T.C.M. (CCH) 874, 882 (1969), aff'd per curiam, 427 F.2d 1176 (5th Cir. 1970). In *Ferrando*, the Ninth Circuit held that "one does not have to be a * * * probate lawyer to know that taxes have to be paid when they are due," and that a taxpayer's duty to file a timely return "is not a delegable one." 245 F.2d at 586, 587-588. And in *Estate of Kerber* v. *United States*, 717 F.2d 454 (8th Cir. 1983), petition for cert. pending, No. 83-1038, the Eighth Circuit reaffirmed a long line of decisions holding that "[t]he executor or executrix has a personal and nondelegable duty to file a timely return," and that reliance on counsel "is not sufficient to constitute 'reasonable cause' for failing to fulfill that duty." 717 F.2d at 455, quoting *Boeving* v. *United States*, 650 F.2d 493, 496 (8th Cir. 1981). Accord, *e.g.*, *Crouse* v. *United States*, 711 F.2d 102, 104 (8th Cir. 1983); *Smith* v. *United States*, 702 F.2d 741, 743 (8th Cir. 1983); *Estate of Lillehei*, 638 F.2d at 66.[4]

[4] The Second and Sixth Circuits, while not explicitly adopting a *per se* approach, have generally rejected the "reliance on counsel" defense to the late-filing penalty. See, *e.g.*, *Estate of Lammerts* v. *Commissioner*, 456 F.2d 681, 683 (2d Cir. 1972) (per curiam); *Estate of Geraci* v. *Commissioner*, 502 F.2d 1148, 1149-1150 (6th Cir. 1974); *Estate of Duttenhofer* v. *Commissioner*, 49 T.C. 200, 204-205 (1967), aff'd per curiam, 410 F.2d 302 (6th Cir. 1969). The Seventh Circuit itself has adopted strikingly divergent tests for determining when the defense is available. Compare *United States* v. *Kroll*, 547 F.2d 393, 396-397 (7th Cir. 1977) (rejecting defense on ground that "the taxpayer has a personal, nondelegable duty to file the tax return when due"), and *Fleming* v. *United States*, 648 F.2d 1122, 1125-1126 (7th Cir. 1981) (same), with *Rokrobaugh*, 611 F.2d at 216 (upholding defense on facts presented). Several courts have upheld the defense where a taxpayer consults an attorney and is advised that no return is required to be filed as a matter of law. See, *e.g.*, *Estate of Lammerts*, 456 F.2d at 683 (citing and distinguishing such cases); *Fleming*, 648 F.2d at 1125 (same). Those cases, in which a taxpayer relies on a lawyer's substantive legal advice, have little to do with the situation (presented here) in which a taxpayer knows that a return must be filed and simply neglects to ascertain what the due date is.

2. The Seventh Circuit erred in holding, contrary to these decisions, that a taxpayer can insulate himself from the penalty for a negligent late filing by entrusting preparation of the return to someone else. The Code and Regulations provide that "any person made liable for any tax * * * shall make a return" (I.R.C. § 6011(a)) and that "each individual (including a fiduciary) shall sign the return "required to be made by him" (Treas. Reg. § 1.6061-1(a)). The Regulations permit a return to be executed by an agent on behalf of the taxpayer in certain circumstances,[5] provided that the return is "accompanied by a power of attorney * * * authorizing [the agent] to represent his principal in making, executing, or filing the return." Treas. Reg.

[5] In the case of income tax returns, a return may be executed by an agent if the taxpayer is unable to make a return "by reason of disease or injury" or "by reason of continuous absence from the United States" for a specified period, or if the taxpayer requests written permission from the district director and the latter "determines that good cause exists for permitting the return to be so made." Treas. Reg. § 1.6012-1(a)(5).

§ 1.6012-1(a)(5). The Code and Regulations specify the time for filing tax returns. I.R.C. §§ 6071-6076; Treas. Reg. § 1.6071-1. If a taxpayer fails to file a return on time, he is liable for the late-filing penalty unless he shows that the delay was "due to reasonable cause." I.R.C. § 6651(a)(1). A delay is due to reasonable cause "[i]f the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time." Treas. Reg. § 301.6651-1(c)(1).

These general rules apply no less to executors of estates. An executor is a fiduciary charged with certain duties, one of which is the duty to file tax returns on the estate's behalf. Section 6018(a) provides that "the executor shall make a return with respect to the estate tax," and the Regulations require tax returns "[to] be signed by * * * the fiduciary, if the person required to make the return is a trust or estate." Treas. Reg. § 31.6061-1. An estate tax return may be executed by a duly authorized agent, provided that an acceptable power of attorney is filed with the I.R.S. empowering the agent to act on behalf of the estate. Treas. Reg. §§ 31.6061-1, 31.6011(a)-7(a). Estate tax returns must be filed "within 9 months after the date of the decedent's death" (I.R.C. § 6075(a)) and, if the return is not timely filed, the estate is liable for the late-filing penalty "unless it is shown that such failure [was] due to reasonable cause" (I.R.C. § 6651(a)(1)).[6] "Reasonable

[6] The courts have uniformly interpreted Section 6651 (a)(1), in accord with its plain language, to make imposition of the late-filing penalty mandatory unless the executor (or other taxpayer) proves both the *absence* of willful neglect and the *presence* of reasonable cause. See, *e.g.*, *Fleming*, 648 F.2d at 1124; *Rubber Research, Inc.* v. *Commissioner*, 422 F.2d 1402, 1407 (8th Cir. 1970); *Logan Lumber Co.*, 268 F.2d at 863; *Ferrando*, 245 F.2d at 589; *Daley* v. *United States*, 480 F. Supp. 808, 810 (D.N.D. 1979); *Richter* v. *United States*, 440 F. Supp. 921, 923 (D. Minn. 1977); *Estate of Mayer* v. *Commissioner*, 43 T.C.

cause" is defined, for estates as for other taxpayers, by an objective "ordinary business care and prudence" standard (Treas. Reg. § 301.6651-1(c)(1)), a standard consistent with the general rule that a fiduciary in managing an estate "is required to manifest the care, skill, prudence, and diligence of an ordinarily prudent man engaged in similar business affairs." Bogert, *Trusts and Trustees* § 541, at 157 (2d rev. ed. 1977).

The vast majority of courts that have considered the question have interpreted these Code and regulatory provisions, correctly, to impose on taxpayers (including executors) a personal, nondelegable duty to file tax returns on time. *E.g.*, *Estate of Kerber*, 717 F.2d at 455; *Millette & Associates*, 594 F.2d at 124-125; *Krall*, 547 F.2d at 396-397; *Ferrando*, 245 F.2d at 586. This obligation inevitably entails a duty, in the exercise of "ordinary business care and prudence," to ascertain the due date of the return, since a taxpayer otherwise will obviously be unable to ensure that his timely-filing obligation is met. If a taxpayer, pursuant to a valid power of attorney, entrusts preparation and execution of the return to an agent, the taxpayer, under hornbook agency doctrine, is responsible as principal for any negligence of his agent in failing to meet the timely-filing requirement. See, *e.g.*, *Fleming*, 648 F.2d at 1125-1126; *Rokrubaugh*, 611 F.2d at 219-220 (Swygert, J., dissenting).

In rejecting the majority view, the Seventh Circuit below relied primarily on a finding that respondent's business experience "did not encompass the preparation or filing of tax returns" (App. A, *infra*, 4a). Respondent's individual experience, however, is irrelevant to the outcome. The Regulations and established fiduciary law set forth an objective, "reasonable man" test—whether the executor "exercised ordinary busine s care

408, 416 n.1 (1964), aff'd per curiam, 351 F.2d 617 (2d Cir. 1965), cert. denied, 383 U.S. 935 (1966).

and prudence." Treas. Reg. § 301.6651-1(c)(1). And even if an executor's particular experience were relevant, one does not need to be expert at the preparation of tax returns to realize that returns have due dates. Indeed, "[a]ny layman with the barest modicum of business experience knows that there is a deadline for the filing of returns and knows that he must sign the return before it is filed." *Krall*, 547 F.2d at 396. Respondent here knew that he had to submit an estate tax return, and he is presumed to have known that the return had a filing deadline. "Ordinary business care and prudence" necessarily required him, as executor of the estate, to inquire what that filing deadline was.

3. The majority view, rejected by the court below, is supported both by common sense and by sound considerations of tax policy. The government is entitled to receive its taxes when they are due. Congress enacted the late-filing penalty, not so much to punish taxpayers, but "to protect the revenue." *Logan Lumber Co.*, 365 F.2d at 854 & n.18, quoting *Plunkett* v. *Commissioner*, 118 F.2d 644, 650 (1st Cir. 1941). If a taxpayer can defeat the penalty by relying on his agent's negligence, the government—which cannot collect the penalty, an "addition to the tax," from the agent either—will be deprived of revenue, even though a return has indisputably been filed late in violation of the Code. The right answer is to let the I.R.S. collect the penalty from the taxpayer, and have the taxpayer seek reimbursement from his agent on grounds of malpractice or breach of fiduciary duty. "In this way," Judge Posner noted below, "proper incentives would be created to avoid a persistent problem in the enforcement of the tax laws" by having liability "come to rest on the person whose fault was primarily responsible" (App. A, *infra*, 16a). As among the I.R.S., the executor and the attorney, the only party who one can say with assurance was not negligent in situations of this sort is the I.R.S. It would

thus be an odd notion of equity to deprive the government of the penalty for a return negligently filed late, to let the passively-negligent executor have the use of the government's money, and to let the actively-negligent lawyer escape completely unscathed. And public policy considerations surely do not favor "immuniz[ing] a negligent attorney from what appears to be an open and shut malpractice suit." *Rohrabaugh*, 611 F.2d at 220 (Swygert, J., dissenting).

4. The question presented has considerable administrative importance. The I.R.S. advises that 237 similar cases, involving more than $2 million in tax, are now pending administratively in the estate tax area alone. The importance of the question, however, is not limited to estate tax cases. The penalty involved here applies equally to the late filing of income, excise, and gift tax returns—indeed, of any tax return other than an information return. See I.R.C. § 6651(a)(1). Literally thousands of taxpayers now have their income tax returns prepared by professional return preparers. The Seventh Circuit's reasoning could enable such taxpayers to defeat the penalty for late filing of those returns simply by alleging that they had relied on their preparer to take care of it.

5. The taxpayer in *Estate of Kerber*, No. 83-1038, has filed a petition for a writ of certiorari seeking review of a question identical to that presented in this case. The facts of the two cases are substantially different, particularly regarding the executors' respective levels of business experience and their patterns of dealing with the tax advisors entrusted with preparing the returns. Although we believe that the availability of a "reliance on counsel" defense to the late-filing penalty should generally not turn on the facts of a particular case, that belief has not been shared by some lower courts (including the court below) that have considered the question.

In our view, the instant case offers a somewhat better vehicle for deciding the legal issue involved. As petitioner in No. 83-1038 acknowledges (Pet. 3-4 & n.1), "the record is not clear" in that case as to two important facts—whether the estate's tax advisors informed the executrix of the return's due date, and, if so, whether the date of which they informed her was the correct one. See 83-1038 Pet. App., A2 & n.1, A8 & n.1. There was likewise dispute about the extent of the executrix's contacts with the estate's attorney concerning the probate administration. See *id.* at A2 n.1. The district court in No. 83-1038 noted these uncertainties, but held that it "need not decide whether genuine issues exist[ed] as to these factual matters, [since] the facts [were] not material to [its] decision" under Eighth Circuit precedents holding the "reliance on counsel" defense unavailable as a matter of law. *Id.* at A2 n.1, A5.

Since a number of courts (including the court below) have found facts of this sort pertinent in determining the availability of the "reliance on counsel" defense (see, *e.g.*, *Rokrabaugh*, 611 F.2d at 216-218), and since there is no ambiguity as to the analogous facts in the instant case (see pages 2-3, *supra*), we suggest that the Court grant certiorari in this case and hold No. 83-1038 pending decision here. Alternatively, if the Court deems it beneficial to have the divergent factual patterns before it as an aid to decision, we urge that certiorari be granted in both cases. In the latter event, the Court may wish to consolidate the cases for briefing and argument.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1983

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 82-1421

ROBERT W. BOYLE, EXECUTOR OF THE ESTATE OF MYRA W. BOYLE, DECEASED,
PLAINTIFF-APPELLEE,

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT.

Appeal from the United States District Court
For the Central District of Illinois
No. 81-1078—**Robert D. Morgan**, *Judge*.

ARGUED SEPTEMBER 17, 1982—DECIDED JUNE 24, 1983

Before POSNER and COFFEE, *Circuit Judges*, and CAMPBELL, *Senior District Judge*.*

CAMPBELL, *Senior District Judge*. The United States brings this appeal challenging the district court's decision granting summary judgment for the plaintiff, Robert Boyle, in his tax refund suit. The Internal Revenue Service (IRS) had assessed a penalty against the plaintiff in the amount of $17,124.45 pursuant to 26 U.S.C. § 6651(a)(1) for the late filing of a federal estate tax return. Boyle paid the penalty and then brought this refund action. After completion of discovery, each party submitted a motion for summary judgment. The

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*The Honorable William J. Campbell, Senior District Judge for the United States District Court for the Northern District of Illinois, is sitting by designation.

district court granted summary judgment for the plaintiff, concluding that the penalty was not justified because the untimely filing was due to a "reasonable cause" within the meaning of 26 U.S.C. § 6651(a)(1). The IRS contends that the district court's decision was erroneous and that its cross-motion for summary judgment should have been granted. Jurisdiction is predicated on 28 U.S.C. § 1291 and is not at issue.

The underlying facts of the case are not in dispute.[1] The plaintiff's mother died on September 14, 1978 and he was appointed executor of the estate in her will. Shortly after his mother's death, Boyle retained Ronald Keyser of the law firm of Eliff, Keyser and Hallberg to serve as attorney for the estate. Keyser had practiced law for over twenty years, specializing in the areas of real estate and probate. During discussions with the attorney, the plaintiff was informed that the filing of a federal estate tax return would be required, however he was not informed, nor did he inquire, as to the deadline for filing it. Under the applicable provision, 26 U.S.C. § 6075(a), the return was due on June 14, 1979, i.e., nine months after the decedent's death.

It is undisputed that Boyle had no experience or expertise in the field of federal estate taxation,[2] and it is evident that he relied solely on his attorney for instruction and guidance. There is no evidence that he was uncooperative with Mr. Keyser or that he was untimely

[1] We note that the government has not argued, either in the district court or in this court, that a genuine issue of fact exists and that a trial is necessary.

[2] The plaintiff had been executor of his father's estate some twenty years earlier, however, there is no evidence that a federal estate tax return was required in that situation. The government notes that the plaintiff had served as president of an earth moving and grading business for approximately thirty years and had signed corporate tax returns during that period. However, the evidence revealed that auditors and accountants prepared and filed the returns.

in providing him with information, records, etc. Boyle and his wife contacted Mr. Keyser numerous times inquiring about the progress of the estate and the preparation of the federal estate tax return. When he called Mr. Keyser on September 6, 1979, the plaintiff was informed for the first time that the return was, in fact, past due. The matter had apparently been overlooked due to a clerical error in omitting the Boyle estate from Keyser's master calendar. As a result, the attorney was not apprised of the due date in a timely manner. Thereafter, the plaintiff met with Keyser on September 11, 1979 and the return was filed on September 13, 1979.

On October 22, 1979, the IRS notified the plaintiff that the estate was being assessed an additional $17,124.45 as a penalty for the late filing as well as $1,326.56 as interest. The plaintiff paid those amounts and filed a claim for refund of the penalty. The IRS took no action on the refund request, so the plaintiff filed this action in the district court.

The district judge concluded that the disposition of the case was controlled by *Rokrubaugh* v. *United States*, 611 F.2d 211 (7th Cir. 1979) which held that, in certain situations, reliance on counsel could be considered reasonable cause for purposes of 26 U.S.C. § 6651(a)(1). The government contends that *Rokrubaugh* is a minority view and should be overruled. Alternatively, the government argues that the facts of this case are distinguishable from those in *Rokrubaugh*. For the reasons stated below, we affirm.

In *Rokrubaugh* v. *United States*, 611 F.2d 211 (7th Cir. 1979) the federal estate tax return was filed three months and a day after its due date. The operative facts were virtually identical to those in the case *sub judice*:

> Here an inexperienced taxpayer wholly unaware of the time requirements for filing a federal estate tax return selected a competent tax expert, supplied him with all the necessary and relevant informa-

> tion, requested him to prepare all necessary documents including tax returns, relied upon his doing so, but nevertheless maintained contact with him from time to time during the administration of the estate. 611 F.2d at 214.

The court adopted the standard that reliance upon counsel would be "reasonable cause" when

> (1) the taxpayer is unfamiliar with the tax law; (2) the taxpayer makes full disclosure of all relevant facts to the attorney or accountant he or she relies upon; and (3) the taxpayer has exercised ordinary business care and prudence. 611 F.2d at 615, *citing Haywood Lumber & Mining Co. v. Commissioner*, 178 F.2d 769, 771 (2d Cir. 1950); *Giesen v. United States*, 369 F.Supp. 33 (W.D. Wis. 1973).

Applying that analysis, the court concluded that, under the facts of that case, "reasonable cause" had been shown and the penalty was therefore wrongfully imposed. The court noted that its holding was to be limited to the facts of the case, and that the case should not be construed as adopting a *per se* rule that reliance on counsel constituted reasonable cause.

Even limiting the holding in *Rohrabaugh* to its facts, we believe that case controls the disposition of this case. The government contends that this case is distinguishable because Boyle had more business experience than the plaintiff in *Rohrabaugh*. We note the factual distinction but do not find it significant. Boyle's business experience did not encompass the preparation or filing of tax returns and therefore would not support any inference that he, in fact, knew the filing deadline, i.e., negating factor (1) stated above. Even assuming that his background would justify the application of a higher standard of business care and prudence, see factor (3) above, we do not find that he failed to exercise such care. He hired competent counsel soon after his mother's death and cooperated fully with him. Furthermore, he maintained contact with his attorney and did

not simply abandon the estate once he had delegated the legal functions. Therefore, we conclude that under *Rohrabaugh*, Boyle qualifies for a refund of the penalty.

The government's alternative argument is that we should overrule *Rohrabaugh* because it conflicts with *United States v. Kroll*, 547 F.2d 343 (7th Cir. 1977) and *Fleming v. United States*, 648 F.2d 1122 (7th Cir. 1981) is a minority view and is bad law. We do not find any conflict in the law of the Seventh Circuit. The court in *Fleming* reconciled the case law in the following manner:

> [I]n *Rohrabaugh* the taxpayer did not know the due date for the filing of the return as did the taxpayer in *Kroll*, as well as in the instant case. 648 F.2d at 1126.

There is another significant distinction. In both *Kroll* and *Fleming*, the taxpayer was informed of the passing of the deadline, and yet did not take timely or effective action to rectify the situation. However, in *Rohrabaugh* and this case, once the taxpayer was made aware of the deadline quick action was taken to file the return. Thus, ordinary business care and prudence was demonstrated and any suggestion of willful neglect was negated.

The government also argues that *Rohrabaugh* is contrary to the majority view on this issue. However, our reading of the cases reveals only three circuits that have unequivocally adopted a *per se* rule that reliance on counsel is not "reasonable cause" within the meaning of 26 U.S.C. § 6651(a)(1), *see Ferrando v. United States*, 245 F.2d 582 (9th Cir. 1957); *Millette Assoc. Inc. v. Commissioner*, 594 F.2d 121 (8th Cir.), *cert. denied*, 444 U.S. 899 (1979); *Estate of Lillehei v. Commissioner*, 638 F.2d 65 (8th Cir. 1981). There are other circuits which have found that reliance on counsel was not "reasonable cause," but the determination was

based on the facts of the case, and not on the application of the *per se* rule advocated by the government, *see e.g. Estate of Duttenhafer v. Commissioner*, 49 T.C. 200 *aff'd per curiam*, 410 F.2d 302 (6th Cir. 1969); *Estate of Lammerts v. Commissioner*, 456 F.2d 681 (2nd Cir. 1972).

The government argues that the *Rohrabaugh* decision is bad law because it encourages executors to remain ignorant of the filing deadline and because:

> [A]n attorney may well avoid giving such information even where the executor does make an inquiry, since it would be not only in the estate's best interest, but also the attorney's own interest to keep the executor uninformed of this crucial matter.

As Judge Pell noted in *Rohrabaugh*, since extensions of time to file an estate tax return are available, there is no reason to believe that an executor would have any motivation to remain ignorant of the filing date in order to obtain immunity for a late filing. Furthermore, in light of the fact that *Rohrabaugh* adopts a case-by-case analysis, it would be foolish for an executor to assume that he or she would obtain judicial relief. For the same reasons, we cannot accept the government's assertion that our position on this issue encourages attorneys to knowingly withhold information from their clients. Furthermore, we note that the "Pandora's box" which was supposedly opened by *Rohrabaugh*, *see* Judge Swygert's dissent, *Rohrabaugh*, 611 F.2d at 219, has not in fact appeared. There has been no flood of lawsuits involving late filings of tax returns and, for the reasons discussed above, we do not expect one.

The circuits which have adopted a *per se* rule that reliance on counsel is not "reasonable cause" have relied, in part, on their conclusion that the executor's duty to file a timely estate tax return is non-delegable. However, it is very easy for judges to speak of non-

delegable duties and to impose on laymen standards of "reasonable care" for handling their legal affairs. Judges have, of course, extensive education and experience in the law. Ordinary laymen do not and they view most legal proceedings as somewhat imposing and mysterious. It is, therefore, not surprising that they should rely on their attorneys to handle their legal affairs. We should be hesitant to find such reliance unreasonable especially when the three factors, discussed *supra*, are present and where there are no facts which should have put the executor on notice that his legal affairs were being neglected. For these reasons, we decline to overrule *Rohrabaugh* and therefore affirm the district court.

COFFEY, *Circuit Judge*, concurring. I agree with Judge Campbell's well-reasoned opinion. I would like to make a few additional comments pertaining to our standard of review of the district court's decision and the limitations imposed upon us by the doctrine of *stare decisis*.

As noted in the majority opinion, this court's *Rohrabaugh v. United States*, 611 F.2d 211 (7th Cir. 1979), decision did not adopt a *per se* rule that reliance on counsel constitutes "reasonable cause" excusing the untimely filing of estate tax returns. Whether reasonable cause exists is, of course, primarily a question of fact to be determined by the trier of fact from all of the facts and circumstances in a particular case. *Estate of DiRezza v. Commissioner*, 78 T.C. 19 (1982) (citing *Estate of Duttenhafer v. Commissioner*, 49 T.C. 200, 204 (1967), *aff'd. per curiam*, 410 F.2d 302 (6th Cir.1979)). The burden of establishing that the failure to file a return was due to reasonable cause is upon the taxpayer. In the instant case, the trial court properly entered summary judgment in favor of the taxpayer after considering all the evidence before it. The limited record in

this case consists of affidavits and depositions of Boyle and Keyser, his attorney. From my review of the record, I am convinced that the trial court properly determined that no material issues of fact existed concerning the background facts and circumstances and that this court's *Rohrabaugh* decision was controlling.

The dissent decrys our majority opinion herein as sanctioning "simple passivity" and rewarding Boyle for "simply clos[ing] his eyes and ears" and filing his return "whenever it pleased him." However, as the majority opinion accurately outlines, there is substantial evidence in the record showing that Boyle did not blindly turn the administration of his mother's estate over to Attorney Keyser or sit by passively as the due date passed. Boyle and his wife contacted Keyser numerous times (the affidavits and the depositions in the record repeatedly make mention of this fact), inquiring about the progress of the estate and, according to Attorney Keyser, Boyle was "repeatedly advised ... that [Keyser] would notify [Boyle] of the date on which [the estate tax return] must be filed and the tax therein paid." During the months immediately preceding the filing of the tax return Boyle "had [his] wife call several times and [Keyser's firm] said they'd take care of it in plenty of time." In fact, an inquiry by Boyle led to the estate tax return being filed within one week after Keyser and Boyle realized it was tardy. These factors alone distinguish the instant case from each and every case cited in the dissent wherein: the taxpayers failed to make numerous inquiries as to the progress of the estate administration; neither were the taxpayers repeatedly advised by their counsel that the returns would be filed in "plenty of time"; nor did the taxpayers' own inquiries trigger the immediate filing of the returns by the attorney after the due date was made known to the taxpayer: (1) *United States v. Kroll*, 547 F.2d 368 (7th Cir. 1977) (involving a delay of over 9 months after knowledge of delinquency); (2) *Estate of Lammerts v. Commissioner*, 456 F.2d 681 (2d Cir. 1972) (per curiam) (no evidence of any inquiry into progress of the estate); (3) *Boering v. United States*, 650 F.2d 493 (8th Cir. 1981), *rev'g*, 493 F. Supp. 665 (E.D. Mo. 1980) (involving a delay of almost 7 months after the erroneously calculated due date); (4) *Estate of Lillehei v. Commissioner*, 639 F.2d 65 (8th Cir. 1981) (per curiam) (no inquiries made); (5) *Ferrando v. United States*, 245 F.2d 592 (9th Cir. 1957) (no questions were asked of counsel); (6) *Estate of Duttenhofer v. Commissioner*, 410 F.2d 302 (6th Cir. 1969) (per curiam), *aff'g*, 49 T.C. 200 (1967) (no inquiries made and constructive notice of actual due date); (7) *Estate of Gerari v. Commissioner*, 502 F.2d 1148 (6th Cir. 1974), *aff'g*, 32 C.C.H. Tax Ct. Mem. 424 (1973) (no evidence of any inquiries and delay of almost one month after the erroneously calculated due date); and (8) *Estate of Mayer v. Commissioner*, 351 F.2d 617 (2d Cir. 1965) (per curiam) (constructive notice of actual due date).

I do not know what else a taxpayer can be expected to do when he retains a professionally trained tax counselor, makes repeated calls to check on the progress of the tax returns and is advised that everything will be taken care of in plenty of time. I understand and agree that courts should understandably be hesitant to impute the misdeeds of a lawyer to his client when the client is not personally negligent, as the facts in this particular case most eloquently recite.

The dissent would require an executor/taxpayer to specifically ask his counsel the exact due date for each tax return in order to be considered as acting "reasonably." No decision of this court, or any other circuit court, has ever held that asking a single magically worded question (the exact due date) is the determining factor in cases such as this. It is neither practical nor realistic to require a taxpayer to specifically inquire as

to the exact filing date, to supervise his attorney's every move, or to, in essence, personally perform those tasks he has entrusted his professionally retained legal counsel to complete. Questions concerning "reasonable cause" and "ordinary business care and prudence" must be resolved in this case in favor of the taxpayer after reviewing the totality of the circumstances, being cognizant of a client's legitimate expectation that counsel will perform competently and professionally. Attorney Keyser was obligated, in accordance with Canon 6 of the Illinois Code of Professional Responsibility, to timely file the estate tax return and taxpayer Boyle reasonably and prudently trusted his counsel to perform responsibly. The dissent admits that Attorney Keyser's active negligence was the primary cause of the late filing and the actions of Boyle, as outlined in the majority and herein, make it clear that the taxpayer was not even passively negligent (Boyle has paid and does not challenge an interest assessment of $1,326.56 which resulted from no fault of his own). The dissent intimates that Attorney Keyser fabricated his version of the interaction between himself and his client concerning the estate tax returns and therefore, according to the dissent, Keyser's affidavit is of little or no probative value. Attorney Keyser swore to his affidavit under oath and I do not believe it is proper for this court or any court to either speculate or question one's integrity without adequate proof. If Attorney Keyser has acted improperly at any time during his representation of Boyle, that is a matter to be considered by the Illinois Supreme Court, not a federal appellate court. If the author of the dissent seriously questions the integrity, honesty and motive of the attorney's affidavit, a complaint should be filed with the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois. An opinion of this court, even a dissent, should not cast aspersions on an attorney on a skeletal record as we have in

this case. The most valuable asset of an attorney is his/her reputation for honesty and integrity, which should not be castigated without adequate proof—much less nothing but speculation as we have in this case.

Even if we accept the dissent's argument that *Rokrabaugh* is in conflict with the law of other circuits, such a contention misses the point. When this court has laid down a principle of law as applicable to a certain state of facts, under the doctrine of *stare decisis* we must adhere to that principle and apply it to all future cases, where the facts are substantially the same. As the majority opinion notes, the district court expressly cited *Rokrabaugh* in reaching its decision that Boyle's failure to file was due to reasonable cause. Because *Rokrabaugh* is the law in this circuit, it is controlling in cases before this court which present substantially similar fact situations. It is our duty to apply the precedent of this court as it exists and it is improper to foist upon litigants our personal views of what the law should be.

I fail to understand why the dissent is so interested in seeing that the innocent taxpayer is assessed a penalty for the late filing of the estate tax return due to the inefficiency, negligence, carelessness and misleading conduct of his tax counsel and see no reason for disturbing the decision of the district court, based on *Rokrabaugh*, which was supported by ample evidence. The taxpayer has already been forced to compensate the government by paying interest of $1,326.56 because the tax payment was approximately three months and a day overdue. The dissent broadly paints a picture of a sophisticated businessman crawling through a "tax loophole" in this case. Although Boyle is referred to as an engineer at a nuclear power plant, by his own testimony he is an "operating engineer," a position requiring no advanced training but only a "union card." There is absolutely no evidence in the record suggesting any

intentional action by Boyle in an attempt to evade taxes or what was justly due the government.

POSNER, *Circuit Judge*, dissenting. The federal estate-tax return must be filed within nine months after the decedent's death, 26 U.S.C. § 6075(a), and for each month that the return is late there is a mandatory penalty of five percent of the tax (up to a limit of 25 percent) "unless it is shown that [the failure to file on time] is due to reasonable cause and not due to willful neglect." 26 U.S.C. § 6651(a)(1). Although in making "willful neglect" the opposite of "reasonable cause" the statute might seem to have modified the ordinary meaning of "reasonable," a Treasury Regulation the validity of which is not questioned requires the taxpayer who would establish "reasonable cause" to show that he "exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time." 26 C.F.R. § 301.6651-1(c)(1). Thus, the test is ordinary negligence.

Appellee Boyle, the decedent's son and the executor of her estate, did not know and did not ask his lawyer when the estate tax return was due; the lawyer neglected to prepare the return in time; and as a result the return was filed three months late and the statutory penalty was assessed. The lawyer, of course, is not liable for the penalty. And he need not fear a malpractice suit, since as a result of this court's decision his negligence has not hurt and may have benefited his client, by enabling the estate to retain for several months, without penalty, money to which the Internal Revenue Service was entitled.

Boyle is not J.P. Morgan or Baron Rothschild but he is an experienced businessman, and not the pathetic "receptionist/telephone operator ... inexperienced in business matters" of *Rohrabaugh v. United States*, 611 F.2d 211, 212 (7th Cir. 1979). For many years president

of an earth-moving company that employed 20 persons, he now works as an engineer for a nuclear power plant. He has a year of college and was the executor of his father's estate. He knew he had to file an estate tax return for his mother's estate, and he must have known that the return was due within a fixed period of time after the decedent's death—that it could not be filed whenever he took a fancy to file it. See *United States v. Kroll*, 547 F.2d 393, 396 (7th Cir. 1977). Since a reasonable man with Boyle's business experience—experience that included signing corporate income tax returns for many years—would have asked his lawyer when the return was due, Boyle cannot appeal to a statute that requires reasonable cause for filing late.

By allowing "simple passivity" to excuse late filing, *Estate of Lammerts v. Commissioner of Internal Revenue*, 456 F.2d 681, 683 (2d Cir. 1972) (per curiam), this court ignores the statute and regulation, goes beyond *Rohrabaugh*, and puts this circuit into conflict with the other circuits that have had to decide when reliance on an attorney's or accountant's error in preparing a timely estate tax return is reasonable cause for filing late. The Eighth and Ninth Circuits hold that the taxpayer's duty of care requires keeping tabs on his lawyer or accountant to make sure he is acting diligently; if as in this case the taxpayer fails in this duty he is guilty of willful neglect (which under the regulation just means negligence) per se and must pay the penalty. *Boeving v. United States*, 650 F.2d 493, 495 (8th Cir. 1981); *Estate of Lillehei v. Commissioner of Internal Revenue*, 638 F.2d 65 (8th Cir. 1981) (per curiam); *Ferrando v. United States*, 245 F.2d 582, 589 (9th Cir. 1957). The Sixth Circuit once took a *Rohrabaugh*-like approach but has since swung round to a hard line similar to that of the Eighth and Ninth Circuits. See *Estate of Duttenhofer v. Commissioner of Internal Revenue*, 410 F.2d 302 (6th Cir. 1969) (per curiam), and especially

Estate of Geraci v. Commissioner of Internal Revenue, 502 F.2d 1148 (6th Cir. 1974), a case much like *Rokrubaugh* (the "executrix, a housewife with no income of her own and little or no business experience, relied entirely on the attorney for the estate to file the return," and the attorney mistook the due date and became incapacitated to boot)—but decided the other way.

Although the Second Circuit condemned "simple passivity" in *Estate of Lammerts*, *supra* (see also *Estate of Mayer v. Commissioner of Internal Revenue*, 351 F.2d 617 (2d Cir. 1965) (per curiam)), a sentence in *Lammerts*—"We refused to penalize the taxpayer which reasonably relied on the accountant to file," 456 F.2d at 683—might appear to give Mr. Boyle some comfort. But the context shows otherwise. The reference is to *Haywood Lumber & Mining Co. v. Commissioner of Internal Revenue*, 178 F.2d 769 (2d Cir. 1950), not an estate tax case, where a penalty had been assessed against the taxpayer for failing to file a personal holding company return. The taxpayer's secretary-treasurer had requested its experienced accountant to prepare the proper tax returns, and neither realized that the taxpayer was in fact a personal holding company. The court pointed out that to require the secretary-treasurer "to inquire specifically about the personal holding company act nullifies the very purpose of consulting an expert. We doubt if anyone would suggest that a client who stated the facts of his case to his lawyer must, in order to show ordinary business care and prudence, inquire specifically about the applicability of various legal principles which may be relevant to the facts stated." *Id.* at 771. But Mr. Boyle did not ask his lawyer whether he had to file an estate tax return and receive a negative answer; he knew he had to file one and must also have known that there was a deadline for filing.

If Boyle had asked his lawyer when the deadline was and the lawyer had misinformed him, that might be reasonable cause for the late filing. But he did not ask. Judge Campbell's statement that "Boyle and his wife contacted Mr. Keyser [the lawyer] numerous times inquiring about the progress of the estate and the preparation of the federal estate tax return" does not accurately reflect the record as I read it; nor did the district judge refer to any such evidence in granting summary judgment for Boyle. Boyle stated in his deposition that he did not ask the lawyer when the return was due until the deadline passed, and while he did testify that his wife "talked with him [Keyser] several times, or someone in the office," he also testified that he thought she had not asked the due date either, "because she didn't know the next fall when it was due, when we discovered that it was late." Whatever the Boyles were discussing with Keyser in this period it was not the due date of the estate tax return that they knew had to be filed and that they must have known had to be filed within a fixed period of time and not simply at their pleasure. Boyle could not simply close his eyes and ears and still be found to have used "ordinary business care and prudence."

The statement in Keyser's affidavit that he told Boyle that Keyser's firm would tell Boyle when the return was due has little if any probative value given the enormous pressure on Keyser to attest to a state of facts that would save his client from having to pay a penalty—and himself from being sued for recovery of that penalty in a malpractice suit. Rather than invite desperately self-serving declarations by negligent lawyers, we should follow the circuits that impose on the taxpayer the duty, easy enough to fulfill, of asking the date the return is due. Let us by all means, in the spirit of *Rokrubaugh*, allow an exception for the completely inexperienced. But let us not create a loophole for the

experienced businessman to crawl through; let us not reward his and his lawyer's carelessness. At least let us not fool ourselves that *Rohrabaugh* requires such a result. Whether a decision shall be deemed a controlling precedent in a later case involving different facts is a judgment that must be made by the court deciding the later case; a broad reading of *Rohrabaugh* is not foreordained.

If Boyle were required to pay the penalty that the Internal Revenue Service assessed, he might well, as I have suggested, have a malpractice claim against his lawyer, whose admitted negligence was the primary cause of the late filing. Liability would thus come to rest on the person whose fault was primarily responsible for depriving the Internal Revenue Service of its due. In this way proper incentives would be created to avoid a persistent problem in the enforcement of the tax laws. Instead the court today adopts an approach that rewards both the active negligence of the lawyer and the passive negligence of his client.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

JUNE 24, 1982.

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *Senior District Judge**

No. 82-1421

ROBERT W. BOYLE, EXECUTOR OF THE ESTATE OF MYRA W. BOYLE, DECEASED,
PLAINTIFF-APPELLEE,

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT.

Appeal from the United States District Court
For the Central District of Illinois,
Peoria Division.

No. 81 C 1078
Opinion by *Judge Campbell*
Judge Coffey concurring
Judge Posner dissenting

Judge Robert D. Morgan

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*The Honorable William J. Campbell, Senior District Judge for the United States District Court for the Northern District of Illinois, is sitting by designation.

This cause was heard on the record from the United States District Court for the Central District of Illinois, Peoria Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

October 11, 1983

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *Senior District Judge**

No. 82-1421

ROBERT W. BOYLE, EXECUTOR OF THE ESTATE OF MYRA W. BOYLE, DECEASED,
PLAINTIFF-APPELLEE,

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT.

Appeal from the United States District Court
For the Central District of Illinois.

No. 81-1078

Robert D. Morgan, *Judge.*

ORDER

On August 8, 1983, defendant-appellant United States filed a petition for rehearing with suggestion of

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*Hon. William J. Campbell, of the Northern District of Illinois, sitting by designation.

rehearing *en banc*. A majority of the judges on the original panel have voted to deny the petition, and a majority of the active judges have voted to deny the suggestion for rehearing *en banc*.** The petition is therefore DENIED.

**Circuit Judges Richard D. Cudahy and Richard A. Posner voted to grant the rehearing *en banc*.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS PEORIA DIVISION

Civil Action No. 81-1078

ROBERT W. BOYLE, EXECUTOR OF THE ESTATE OF MYRA W. BOYLE, DECEASED, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT.

[FILED JAN. 14, 1982]

ORDER

Cause now coming on for hearing on Motion for Summary Judgment of Plaintiff, ROBERT W. BOYLE, Executor of the Estate of Myra W. Boyle, Deceased, and on Cross-Motion for Summary Judgment of Defendant, UNITED STATES OF AMERICA, and Plaintiff appearing by William L. Kasley of Elliff, Keyser, Oberle & Davies, P.C. and Defendant appearing by Janet Jannusch, Assistant U.S. Attorney, and the Court considering said Motions and supporting memoranda, and hearing argument of counsel, and being advised in the premises, FINDS:

1. That this Court has jurisdiction over the parties hereto and of the subject matter hereof.

2. That there are no genuine issues as to any material fact in this cause.

3. That this action arises under the provisions of Title 28, Section 1346(a)(1) and Title 26, Sections 6651 and 7422(a), of the United States Code.

4. That Plaintiff is an individual, residing at Rural Route, Mackinaw, County of Tazewell, State of Illinois.

5. That Defendant is the UNITED STATES OF AMERICA.

6. That Plaintiff is the son of Myra W. Boyle, Deceased, and the duly appointed, qualified, and acting executor of the estate of said decedent.

7. That decedent died September 14, 1978 leaving a Last Will and Testament dated June 6, 1974. Decedent was a resident of the Village of Mackinaw, County of Tazewell, State of Illinois, and left surviving as her sole heirs the following named children: Charles B. Boyle, Robert W. Boyle, Grover J. Boyle, and Dorothy Neathery.

8. That as provided in the Last Will and Testament of Myra W. Boyle the following are testator's heirs, legatees, and devisee: Charles B. Boyle, Robert W. Boyle, Grover J. Boyle, Dorothy Neathery, and First Farmers State Bank of Minier as Trustees.

9. That the Federal Estate Tax Return, Form 706, in this estate was due nine months after the date of death of the decedent, and same being June 14, 1979.

10. That on September 13, 1979, Plaintiff filed said estate tax return for the decedent's estate with the Internal Revenue Service, Kansas City, Missouri; and at such time and place, Plaintiff paid to said Internal Revenue Service the sum of $85,622.26, the amount shown by the return to be due and payable.

11. That on October 22, 1979, the Internal Revenue Service mailed to the Plaintiff a request for payment, setting forth as additional amounts due and owing to the Internal Revenue Service the sum of $17,124.45 as penalty for said Federal Estate Taxes on the Myra W. Boyle Estate and the sum of $1,326.56 as interest for the Federal Estate Taxes on the Myra W. Boyle Estate. Said sums were paid by Plaintiff to the Internal Revenue Service on February 9, 1980.

12. That on February 9, 1980, Plaintiff duly filed with the Internal Revenue Service a claim for refund, and duly demanded the refund and payment of $17,124.45, said sum representing the penalty assessed

and paid by the Estate of Myra W. Boyle together with interest as provided by law.

13. That the Internal Revenue Service took no action on this claim for refund within six months after the filing of the same.

14. That the penalty assessment in this estate was based upon the determination by the Internal Revenue Service that the estate did not establish reasonable cause to abate the penalty as required by Section 6651 of the Internal Revenue Code.

15. That the facts of this cause are more closely alligned [*sic*] to the facts of *Rokrohaugh v. United States*, 611 F.2nd 217 (7th Cir. 1979) cited by Plaintiff, rather than *United States v. Kroll*, 547 F.2nd 393 (7th Cir. 1977), and *Fleming v. United States*, 648 F.2nd 1122 (7th Cir. 1981), cited by Defendant, and *Rokrohaugh* is controlling in this cause.

16. That based on *Rokrohaugh*, the Internal Revenue Service erroneously and improperly concluded that there was not reasonable cause to allow the abatement of the penalty in this estate, and collected and withheld said penalty without authority.

17. That based on *Rokrohaugh*, Plaintiff's failure to file the estate tax return in this estate was due to reasonable cause and not due to willful neglect on the part of the Plaintiff and/or his agents.

18. That based on *Rokrohaugh*, Plaintiff is entitled to a full refund of the estate tax penalty paid to Defendant, but to date, no part of said sum of $17,124.45, the amount of penalty assessed against this estate, has been refunded to the Plaintiff by Defendant.

19. That there is no just cause for delay in the entry of a Judgment Order herein.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

A. That Plaintiff, ROBERT W. BOYLE, Executor of the Estate of Myra W. Boyle, Deceased, recover

APPENDIX E

Internal Revenue Code of 1954, 26 U.S.C. 6018:

Estate Tax Returns.

(a) *Returns by Executor*—

(1) *Citizens or residents.*—In all cases where the gross estate at the death of a citizen or resident exceeds $175,000, the executor shall make a return with respect to the estate tax imposed by [Section 2001].

* * * * *

(3) *Phase-in filing requirement amount.*—In the case of a decedent dying before 1981, paragraph (1) shall be applied—

* * * * *

(B) in the case of a decedent dying during 1978, by substituting "134,000" for "$175,000."

* * * * *

Internal Revenue Code of 1954 (26 U.S.C.):

Section 6075. Time for Filing Estate and Gift Tax Returns.

(a) *Estate Tax Returns.*—Returns made under section 6018(a) (relating to estate taxes) shall be filed within 9 months after the date of the decedent's death.

Section 6651. Failure to File Tax Return or to Pay Tax.

(a) *Addition to the Tax.*—In case of failure—

(1) to file any return required under authority of subchapter A of chapter 61 (other than part III thereof), subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), or subchapter A of chapter 53 (relating to machine guns and certain other firearms), on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that

from the Defendant, UNITED STATES OF AMERICA, the sum of $17,124.45, the estate tax penalty paid herein, and interest thereon as provided by statute, and costs incurred herein.

B. That Plaintiff is awarded execution for the collection of the Judgment, interest and costs granted hereunder.

C. That the Court hereby retains jurisdiction of this cause and of the parties hereto for the purpose of enforcing this Order.

ENTER:

/s/ Robert D. Morgan
Judge

DATED: JANUARY 14, 1982

such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate * * *.

RESPONDENT'S

BRIEF

No. 83-1266 (2)

FILED

MAR 3 1984

ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

October Term, 1983

United States of America, PETITIONER

v.

Robert W. Boyle, Executor of the Estate of
Myra W. Boyle, Deceased

RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Counsel of Record:

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Additional Counsel:

RONALD L. KEYSER
TIMOTHY W. KIRK

---

7 pp

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QUESTION PRESENTED

Whether this Court should adopt a per se rule that reliance on counsel shall never constitute reasonable cause within the meaning of §6651(a)(1) of the Code.[1]

---

[1] Unless otherwise noted, all statutory references to "the Code" or "I.R.C." are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended.

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In the Supreme Court of the United States

October Term, 1983

No. 83-1266

United States of America, PETITIONER

v.

Robert W. Boyle, Executor of the Estate of Myra W. Boyle, Deceased

RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT

The Respondent adopts the factual statement made by the court of appeals. (App.A., 2-4a).[1]

ARGUMENT

1. The United States Congress, in adopting the Code, saw fit to provide for late filing penalties in §6651. Congress nonetheless recognized that there would arise certain limited factual circumstances where the imposition of a late filing penalty would not be equitable. Congress chose to legislate that a late filing penalty shall be imposed "unless it is shown that such failure is due to reasonable cause and not due to willful neglect." I.R.C. §6651(a)(1).

Whether or not a taxpayer's failure to file a timely return was due to reasonable cause is clearly a fact question. *Ferrando v. United States*, 245 F.2d 582 (9th Cir. 1957). By creating the reasonable cause standard in §6651(a)(1) of the Code, Congress obviously recognized that each late filing situation should be determined on its own merits.

Petitioner is now asking this Court to adopt a per se rule that a taxpayer's reliance on an attorney to prepare an estate tax return for him shall never constitute reasonable cause within the meaning of Code §6651(a)(1). The position argued for by Petitioner is simply inconsistent with the statutory language at issue here which provides for a case-by-case review of the facts involved in determining whether or not a taxpayer's failure to file a timely return was due to reasonable cause.

---

[1] "App.A." refers to Appendix A attached to and made part of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Congress chose to impose a late filing penalty. Congress also chose not to impose the late filing penalty where the failure to file a timely return is due to reasonable cause and not due to willful neglect. Congress, accordingly, should be the body that determines whether or not a per se rule in this area is to become the law. Petitioner's proper remedy is to address its concerns to Congress rather than to this Court.

2. As was noted by the Seventh Circuit below, the Petitioner's assertion that common sense and tax policy require the adoption of a per se rule on this question is unfounded. (App.A., 6a). First, a taxpayer who is aware of an upcoming filing date but who knows he will be unable to file a timely return may simply request an extension of time to file an estate tax return and thereby obtain immunity from the late filing penalty. I.R.C. §6081. Secondly, whether or not a taxpayer's failure to file a timely return was due to reasonable cause is a fact question to be determined on a case-by-case basis, and as was stated by the Seventh Circuit below "it would be foolish for an executor to assume that he or she would obtain judicial relief." (App.A., 6a). Finally, Code §6601(a) imposes an interest charge on all unpaid taxes from the due date for filing the tax return to the date the tax is paid. The Respondent in this case paid the interest charge imposed by Code §6601(a) and contrary to the Petitioner's argument he did not have free use of the funds following the due date for filing the return.

3. The penalty provisions of the revenue laws were designed to be imposed upon "conduct which is intentional, or knowing, or voluntary, as distinguished from accidental." *United States v. Murdock*, 290 U.S. 389, 394 (1933). "It is not the purpose of the law to penalize innocent errors despite the exercise of reasonable care." *Spies v. United States*, 317 U.S. 492,496 (1942). As was so aptly stated by the Seventh Circuit in *Rokrubaugh v. United States*, 611 F.2d 217 (7th Cir. 1979), "the penalty sword should not be wielded without adequate

regard to the circumstances of the case." *Rohrbaugh*, *supra* at 219. As was determined by both the District Court and the Seventh Circuit below, the Respondent's failure to file a timely tax return was due to reasonable cause; and the imposition of a penalty therefor would be unfounded. (App.A., 7a, 23a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

Nathan T. Elliff
Ronald L. Keyser
Timothy W. Kirk

JOINT

APPENDIX

Office - Supreme Court, U.S.
FILED
JUN 9 1994
ALEXANDER L. STEVAS,

No. 93-1266

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT W. BOYLE, EXECUTOR OF THE ESTATE OF MYRA W. BOYLE, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI
FILED JANUARY 20, 1994
CERTIORARI GRANTED MARCH 28, 1994

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* The opinion and judgment of the court of appeals, and the order of the district court, are printed in the appendix to the petition for writ of certiorari and have not been reproduced here.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

Civil Action No. 81-1078

ROBERT W. BOYLE, EXECUTOR OF THE ESTATE OF
MYRA W. BOYLE, DECEASED, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

RELEVANT DOCKET ENTRIES

DATE		PROCEEDINGS
1981		
May 22	1	Complaint, filed.
May 26		Summons, issued.
June 9	2	Summons ret.—Mar. exw. 5-29-81 on Gerald Fines, U.S. Atty., Mar. exw. by cert. mail on Wm. French Smith, U.S. Atty. Gen. on 5-30-81 (3.00) Mar. ret. exw. on 6/1/81 on I.R.S by cert. mail. ($3.00)
July 29	3	Answer, fd. by deft.
Aug. 3	4	Case set for Preliminary Pre-Trial Conference, Friday, August 14, 1981 @ 2:30 P.M., notices sent by Clerk. (Morgan, J)
Aug. 14		Parties present by/c for Prelim. Pre-Trial Conf. Discovery to be completed by parties by Nov. 15, 1981. (Morgan, J)

DATE		PROCEEDINGS
Nov. 9	5	FINAL PRE-TRIAL CONFERENCE set for Monday, November 16, 1981 at 2:00 p.m., Notices sent by Clerk. (Morgan, J)
Nov. 16		By agreement of the parties, cross Motions for Summary Judgment to be filed by Dec. 1, 1981. (Morgan, J)
Dec. 1	6	MO For Summary Judgment, fld. by pltf. w/Exhibits A-C.
Dec. 2	7	Deft's. MO For Summary Judgment, fld. w/Memo. in Support of Deft's. MO For Summary Judgment, fld. w/attachments.
Dec. 22	8	Case set for Hearing on Pending Motions Jan. 12, 1982 at 3 P.M. (Cal. & Notices prepared)
Dec. 31	9	Deposition of Rbt. Boyle & R.L. Keyser filed.
1982		
Jan. 12		Parties pres. by/c for hearing on cross motions for summary judgment. Pltfs. Motion for summary judgment is ALLOWED. Gov't. MO DENIED. Judgment entered in favor of Pltf. and against Gov't. for return of penalty. (Morgan, J)
Jan. 14	10	ORDER, filed & entered. ORDERED that Judgment is entered in favor of Pltf. & against deft. in the amount of $17,124.45 + interest & costs. (See Order) (Copies sent to parties of record by Clerk) (Morgan, J)
Jan. 12		CLOSED JS 6

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 82-1421

ROBERT W. BOYLE, EXECUTOR OF THE ESTATE OF MYRA W. BOYLE, DECEASED, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1982	
4/21	Filed 6thCir citation of additional authority. dist.
4/29	Filed 15c brief w/appdx. of appellant.
5/28	Filed 15c brief for appellee.
8/2	Entered order setting appeal for oral argument on Fri. 9/17/82 at 2:00 pm. Oral argument is limited to 15 min. each side.
9/25	BRIEFS DISTRIBUTED TO PANEL.
9/17	Heard and taken under advisement.
1983	
6/24	ORDER: Final judgment AFFIRMED, with costs.
6/24	Filed opinion by J. Campbell, AFFIRMED, J. Coffey concurring, J. Posner dissenting.
7/5	Filed appellant's motion for extension of time to file brief.
7/7	ORDER: Appellant's motion of 7/5/83 is GRANTED, petition for rehearing is due 8/8/83.

DATE	PROCEEDINGS
8/8	Filed 25c appellants' petition for rehearing w/sugg. for rehearing en banc, dist.
8/10	Filed copy of letter to appellee requesting 25c of their answer to the petition for rehearing w/sugg. for rehearing en banc on or before 8/24/83.
8/18	Filed appellee's motion for extension of time to file answer to the petition for rehearing.
8/24	ORDER: Appellee's motion of 8/18/83 is GRANTED, the answer to the petition for rehearing is due 9/14/83.
9/14	Filed 25c appellee's answer to petition for rehearing w/sugg. for rehearing en banc, dist.
10/7	Filed appellant's additional authority, dist.
10/11	ORDER: Petition for rehearing is DENIED.
10/26	MANDATE ISSUED.
10/31	Filed receipt from dist. ct. for mandate.
1984	
2/8	Filed notice of filing petition for cert. in Sup. Ct., No. 83-1266.
3/28	Filed copy of order from Sup. Ct. GRANTING petition for cert.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

No. 81-1078

ROBERT W. BOYLE, Executor of the Estate of
Myra W. Boyle, Deceased, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed May 22, 1981]

COMPLAINT FOR REFUND OF ESTATE TAX PENALTY

NOW COMES the Plaintiff, ROBERT W. BOYLE, Executor of the Estate of MYRA W. BOYLE, Deceased, by his attorneys, ELLIFF, KEYSER, OBERLE & DAVIES, P.C., and for this Complaint states as follows:

1. The action arises under the provisions of Title 28, Section 1346(a)(1) and Title 26, Sections 6651 and 7422(a), of the United States Code, as herein more fully appears.

2. Plaintiff is an individual, residing at Rural Route, Mackinaw, County of Tazewell, State of Illinois.

3. Defendant is the UNITED STATES OF AMERICA.

4. Plaintiff is the son of Myra W. Boyle, Deceased, and the duly appointed, qualified, and acting executor of the estate of said decedent.

5. Decedent died September 14, 1979 leaving a Last Will and Testament dated June 6, 1974, a copy of which is attached hereto and incorporated by reference herein

as exhibit A. Decedent was a resident of the Village of Mackinaw, County of Tazewell, State of Illinois, and left surviving as her sole heirs the following named children: Charles B. Boyle, Robert W. Boyle, Grover J. Boyle, and Dorothy Neathery.

6. As provided in the Last Will and Testament of Myra W. Boyle the following are testators heirs, legatees, and devisees: Charles B. Boyle, Robert W. Boyle, Grover J. Boyle, Dorothy Neathery, and First Farmers State Bank of Minier as Trustees.

7. The Federal Estate Tax Return, Form 706, in this estate was due nine months after the date of death of the decedent the same being June 14, 1979.

8. On September 13, 1979, Plaintiff filed said estate tax return for the decedent's estate with the Internal Revenue Service, Kansas City, Missouri; and at such time and place, Plaintiff paid to said Internal Revenue Service the sum of $83,622.26, the amount shown by the return to be due and payable.

9. On October 22, 1979, the Internal Revenue Service mailed to the Plaintiff a request for payment, setting forth as additional amounts due and owing to the Internal Revenue Service the sum of $17,124.45 as penalty for said Federal Estate Taxes on the Myra W. Boyle Estate and the sum of $1,326.56 as interest for the Federal Estate Taxes on the Myra W. Boyle Estate. Said sums were paid by Plaintiff to the Internal Revenue Service on February 9, 1980. A copy of the request for payment is attached hereto and incorporated by reference herein as exhibit B.

10. On February 9, 1980, Plaintiff duly filed with the Internal Revenue Service a claim for refund, and duly demanded the refund and payment of $17,124.45 said sum representing the penalty assessed and paid in the Estate of Myra W. Boyle together with interest as provided by law. A copy of such claim for refund is attached hereto, marked as exhibit C, and incorporated by reference herein.

11. It has been over six months since Plaintiff filed his claim for refund, and the Internal Revenue Service has taken no action on the same.

12. The penalty assessment in this estate was based upon the determination by the Internal Revenue Service that the estate did not establish reasonable cause to abate the penalty as required by Section 6651 of the Internal Revenue Code.

13. In its determination of said penalty, the Internal Revenue Service erroneously and improperly concluded that there was not reasonable cause to allow the abatement of the penalty in this estate, and has therefore collected and withheld said penalty without authority.

14. Plaintiff's failure to file the estate tax return in this estate was due to reasonable cause and not due to willful neglect on the part of the Plaintiff and/or his agents.

15. No part of the sum $17,124.45, the amount of penalty assessed against this estate, has been refunded to the Plaintiff.

Wherefore, Plaintiff demands judgment against the Defendant for the sum of $17,124.45, together with interest as provided by law.

ROBERT W. BOYLE, Executor of the Estate for Myra W. Boyle, Deceased, by ELLIOT, KEVERN, OBERLE & DAVERN, P.C., his attorneys.

ELLIOT, KEVERN, OBERLE & DAVERN, P.C.
Fourth & Broadway Building
Pekin, IL 61554
(309) 346-4149

[EXHIBIT A]

WILL

I, MYRA W. BOYLE, of the Village of Mackinaw, Tazewell County, Illinois, do hereby make, publish, and declare this as my Will.

1. I direct my Executor to pay all of my just debts and funeral expenses.

2. I give and bequeath all of my household furnishings, share and share alike, to my children and request that they divide the same among themselves and that no public sale thereof be had.

3. I direct my Executor, or alternate Executor, as the case may be, to sell and convert into cash all the rest and residue of my estate. I expressly empower such Executor to sell and convey any real estate that I may own at the time of my death for such price or prices as such Executor deems proper upon such terms as such Executor deems proper, all without the order or approval of any court whatsoever and without the filing and having approved any bond or additional bond whatsoever.

4. After the payment of all debts, claims, charges, inheritance taxes, and estate taxes, if any, I direct that the net estate be distributed as follows:

(a) One-fourth thereof to my son, Robert W. Boyle;

(b) One-fourth thereof to my son, Grover J. Boyle;

(c) One-fourth thereof to my son, Charles B. Boyle;

(d) One-fourth thereof to The Farmers State Bank of Minier, Minier, Illinois, in trust upon the following uses and purposes:

(1) Said Trustee is authorized and empowered to manage, care for, invest, re-invest, control, and otherwise deal with the trust estate or any part thereof, in its discretion, in any and every way in which an owner having unrestricted ownership might do.

(2) Said Trustee shall pay over the net income from the trust, annually, or more often in its discretion, to my daughter, Dorothy A. Neathery, so long as she shall live.

(3) Upon the death of my daughter, Dorothy A. Neathery, the Trustee shall distribute the trust estate plus any undistributed income, share and share alike to my sons, Robert W. Boyle, Grover J. Boyle, and Charles B. Boyle. In the event any of said sons is not living upon the distribution of the trust assets, the descendant or descendants of such son shall take per stirpes the share such deceased son would have taken if living. If any of said sons leaves no descendant or descendants at the time of such distribution, the share he would have taken if living shall be added ratably to the other distributive shares.

5. I nominate and appoint my son, Robert W. Boyle, as Executor hereof and direct that no security be required on his bond. If for any reason he does not act or continue to act as such Executor, I nominate and appoint my son, Charles B. Boyle, as Executor hereof and direct that no security be required on his bond.

EXECUTED at Pekin, Illinois, this 6th day of June, 1974.

/s/ Myra W. Boyle (SEAL)

The foregoing instrument was on the date thereof subscribed by the testator in our presence, and was at the same time declared by her to be her Will, and we, at the same time, in her presence, at her request, and in the presence of each other, hereunto subscribed our names as witnesses. And we do hereby certify that at the time of the execution of this Will, the testator was of sound mind and memory and under no constraint.

/s/

/s/

[EXHIBIT B]

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE
SERVICE CENTER
P.O. Box 24842
Kansas City, MO 64131

YJ 354282302 52 0000 670 7941

MYRA W. BOYLE ESTATE
ROBERT W. BOYLE
Box 3
Mackinaw, IL 61755

Request for Payment

Our records show that a payment is due on your account. Please make the payment by the due date shown in the statement at the right.

If your records do not agree with the total credits shown, we may have credited your payment to another kind of tax. Please help us by completing the information requested about this payment on the back of this notice and returning it to us. If more than one payment is involved, attach a list giving the information requested for each payment.

If the balance is incorrect for any other reason, please furnish us an explanation.

In either case, you will need to subtract the payments we haven't included and send us any adjusted balance due. Make your check or money order payable to the Internal Revenue Service for the adjusted balance due. Please show your employer identification number on your payment and mail it with this notice in the envelope enclosed for your convenience.

Thank you for your cooperation.

8047 161

Date of This Notice—Oct. 22, 1979

Employer Identification Number—354-28-2302 YJ

Document Locator Number—37506-262-55902-9

Form Number—706

Tax Period Ended—

Balance is Due By—Nov. 1, 1979

Date of Death—Sep. 14, 1978

FEDERAL ESTATE TAXES

Tax Statement

Total Tax on Return	$85,622.26
Total Credits	85,622.26–
Plus Penalty *	17,124.45
Plus Interest	1,326.56
Balance Due IRS ►	$18,451.01
Subtract Payments We Haven't Included	
Pay Adjusted Balance Due	$———

* See these code numbers on the back for an explanation of penalty or interest charges: 01-09

(FORM 4192 (Part 1) (Rev. 7-77)

[EXHIBIT C]

Form 843
(Rev. June 1978)
Department of the Treasury
Internal Revenue Service

Claim

If your claim is for an overpayment of income taxes, do NOT use this form (see instructions)

1 Name of taxpayer or purchaser of stamps
Myra V. Boyle Estate

Number and street
% Robert W. Boyle, Executor

City or town, State, and ZIP code
Box 3, Pachinow, IL 61731

Fill in applicable items—Use attachments if necessary

2 Your social security number

3 Employer identification number
37-6189601

4 Internal Revenue Service office where return (if any) was filed
Kansas City, Missouri

5 Name and address shown on return, if different from above
Same as above

6 Period—prepare separate form for each taxable period
From ..., 19.. To ..., 19..

7 Amount to be refunded or abated
$ 17,124.43

8 Dates of payments

9 Type of tax
☐ Employment ☐ Estate ☐ Excise ☐ Gift ☐ Stamp

10 Kind of return filed
☐ 706 ☐ 709 ☐ 720 ☐ 941 ☐ 941-PR ☐ 941-SS ☐ 4720 ☐ Other (specify) ▶

11 Explain why you believe this claim should be allowed and show computation of tax refund or abatement.

This claim should be allowed as it was not a result of the Executor's willful neglect in the late filing of the Federal Tax Return as evidenced by copies of the affidavits submitted herewith. The penalty assessed by reason of the foregoing amounted to $17,124.43.

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Signature ..... Date ..... Title .....

Robert W. Boyle, Executor

Spouse's signature (if joint return)

For Internal Revenue Service Use Only

CHECK
☐ Refund of taxes illegally, erroneously, or excessively collected
☐ Refund of amount paid for stamps affixed to, or used on, wrong or spoiled
☐ Assessment of tax exempted (not applicable to excise or gift taxes)

For instructions see back. Form 843 (Rev. 6-78)

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

Civil Action No. 81-1078

ROBERT W. BOYLE, Executor of the Estate of Myra W. Boyle, Deceased, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed Jul. 29, 1981]

ANSWER

The United States of America, by its attorney, Gerald D. Fines, the United States Attorney for the Central District of Illinois, hereby answers the plaintiff's Complaint as follows:

1-4. It admits the allegations contained in paragraphs one through four.

5, 6. It lacks knowledge or information sufficient to form a belief as to the truth of the matters alleged in paragraphs five and six.

7. This is an allegation of law not requiring a responsive pleading.

8-11. It presently lacks knowledge or information sufficient to form a belief as to the truth of the matters alleged in paragraphs 8 through 11.

12-14. It denies the allegations contained in paragraphs 12 through 14.

15. It presently lacks knowledge or information sufficient to form a belief as to the truth of the matters alleged in paragraph 15.

WHEREFORE, having fully answered the defendant, United States of America, prays:

1. That the plaintiff's Complaint be dismissed with prejudice, and
2. That it be awarded its costs of this action.

GERALD D. FINES
United States Attorney

By: _____
Assistant United States Attorney

AFFIDAVIT

STATE OF ILLINOIS)
) ss:
COUNTY OF TAZEWELL)

The undersigned, RONALD L. KEYSER, having been first duly sworn on oath deposes and says:

1. That he is 45 years of age and is a resident of the City of Pekin, Tazewell County, Illinois, and makes this affidavit under penalty of perjury.
2. That he was licensed to practice law on the 16th day of October, 1957 and with the exception of 15 months in the military service of the United States during the years 1957 and 1961 he has been engaged in the active practice of law in the State of Illinois.
3. That he is a partner in the firm of Elliff, Keyser & Hallberg at 4th & Broadway Building, Pekin, Illinois, and has been such a partner for more than ten years last past.
4. That the undersigned affiant during his years of practice has been engaged in a general practice with emphasis placed on real estate and probate matters and that the firm of Elliff, Keyser & Hallberg has been in existence for more than 70 years having been started by John T. Elliff, the father of Nathan T. Elliff, one of affiant's legal partners, and that said firm has consistently during said years been engaged in the general practice of law with a heavy emphasis upon real estate and probate law.
5. That affiant in 20+ years of practice has never missed the filing of a Federal Estate Tax Return within the time required by law.
6. That the undersigned firm was hired by Robert W. Boyle to handle the probate and Federal Estate Tax matters pertaining to the Estate of Myra W. Boyle and repeatedly advised the Executor of said estate that said firm would notify said Executor of the date on which said

Federal Estate Tax Return must be filed and the tax therein paid.

7. That at the time said Federal Estate Tax Return was due in July of 1979 and for some time prior thereto affiant's said law firm consisted of six lawyers and was in the process of obtaining the employment of an additional attorney because of the large workload of said firm.

8. That at the time of the death of the decedent herein referred to and at all times subsequent thereto it has been the general and standard procedure that the due dates of all Federal Estate Tax Returns in all estates in which the office is involved were to be posted on a master calendar by the secretary of the attorney having prime responsibility for the particular estate and that the attorney is then advised at least ten days prior to the filing of said return by his secretary of the due date.

9. That the estate of the undersigned affiant was not listed upon said calendar and the reason for which is unknown to affiant or anyone in affiant's firm.

10. That affiant had in the early spring of 1979 requested assistance from another attorney in said firm for the purpose of working on the decedent's Federal income tax return and that said file remained in said other attorney's office for sometime thereafter.

11. That on or about September 6, 1979, Robert W. Boyle, Executor of the decedent's estate again called and requested information as to when the Federal Estate Tax Return was to be filed and it was at that time that affiant realized that the Federal Estate Tax Return had not been filed.

12. That immediately upon learning of the non-filing of said return, affiant immediately prepared the same and submitted it to the Internal Revenue Service at Kansas City, Missouri, on the 13th day of September, 1979 and saw to the payment of the tax on said date.

13. That the system maintained by said firm for the purpose of advising the respective attorneys of filing dates

for Federal Estate Tax Returns has been effective in the past years and is a reasonable method of keeping track of the filing dates thereon, and that the undersigned affiant nor his firm was not guilty of willful neglect in failing to file said return by the due date thereof.

Dated this — day of September, 1979.

RONALD L. KEYSER

SUBSCRIBED AND SWORN TO BEFORE ME this — day of September, 1979.

Notary Public

AFFIDAVIT

STATE OF ILLINOIS)
) ss:
COUNTY OF TAZEWELL)

The undersigned, ROBERT W. BOYLE, having been first duly sworn on oath deposes and says:

1. That he is 62 years of age and is a resident of the Village of Mackinaw, Tazewell County, Illinois, and makes this affidavit under penalty of perjury.

2. That he is a son of Myra W. Boyle who died on the 14th day of September, 1978.

3. That he was appointed Executor of the Last Will of said Myra W. Boyle on the 2nd day of October, 1978, by the Circuit Court of the Tenth Judicial Circuit of Illinois and is now and has ever since his said appointment been the duly qualified and acting Executor of the Last Will of Myra W. Boyle, deceased.

4. That at all times immediately prior to and to the date hereof Ronald L. Keyser of the firm of Elliff, Keyser & Hallberg, 4th & Broadway Building, Pekin, Illinois, has been retained and has been acting as my attorney as such Executor in connection with all matters pertaining to the estate of the said Myra W. Boyle including the preparation of the Federal Estate Tax Return for said decedent's estate.

5. That at the time of the death of the said Myra W. Boyle she was the owner of the real estate described in Schedule A of the Federal Estate Tax Return filed herein and that said premises were offered for sale at public auction and that the closing of said premises took place in the spring of 1979; that upon admission of the said decedent's Will to probate and the appointment of the undersigned as Executor therein, the undersigned was advised by the said Ronald L. Keyser that said attorney would let the undersigned know in sufficient time as to

when the Federal Estate Tax Return and death taxes would have to be filed and paid.

6. That the undersigned has been engaged in grading and road construction for at least the past 20 years and does not have any legal, accounting or like background and for this reason relied upon the said Ronald L. Keyser to advise him as to when the said return was to be filed and the taxes paid.

7. That the undersigned did on a number of occasions including late spring of 1979 specifically ask when the return was due, but was only advised that he would be notified in due course as to the due date.

8. That having not heard from the said attorney as to the filing date, the undersigned did on or about September 6, 1979, personally call the said attorney and was advised by the said attorney that the return was past due and immediately thereafter made an appointment with the attorney for September 11, 1979, to proceed with the preparation of the tax return.

9. That on or about Wednesday, September 13, 1979, the undersigned executed the Federal Estate Tax Return and request for early audit and delivered the check in payment thereof to said attorney and at which time the said attorney advised the undersigned he would mail the return, check and request for early audit that day.

10. That the firm of Elliff, Keyser & Hallberg with which the said Ronald L. Keyser is a partner had previously handled the undersigned's deceased father's estate a number of years prior hereto and the undersigned had no reason to believe that the said firm and the said Ronald L. Keyser would handle this estate in any improper manner and that said firm has been established in Tazewell County, Illinois for a continuous period of over 50 years and has specialized primarily in real estate and probate work; that the undersigned had furnished all information which said attorneys had requested in connection with the preparation of said Federal Estate Tax Return several months prior to what the undersigned has now

found to be the due date of the Federal Estate Tax Return.

11. That your undersigned Executor's failure to file such return within the specified time period was a result of his total reliance upon the attorney and the failure to file within said time was not due to the undersigned's willful neglect.

12. That the undersigned Executor respectfully requests that any penalties applicable by reason of the filing of the late return herein be waived.

Dated this — day of September, 1979.

ROBERT W. BOYLE

SUBSCRIBED AND SWORN TO BEFORE ME this — day of September, 1979.

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

Civil Action Number 81-1078

ROBERT W. BOYLE, executor of the Estate of MYRA W. BOYLE, Deceased, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

THE DEPOSITION of RONALD L. KEYSER, called as a witness on behalf of the defendant, before me, Grace Cafaro, CSR, RPR-CP, a Notary Public in and for the County of Peoria and State of Illinois, at 4th and Broadway Building, in the City of Pekin, County of Tazewell and State of Illinois, on the 11th day of November, A.D. 1981.

[2] APPEARANCES:

Eliff, Keyser, Oberle & Davies, P.C.
4th and Broadway Building
Pekin, Illinois 61554
By: William L. Kasley, Esq.

For the plaintiff

United States Department of Justice
Tax Division
Washington, D.C. 20530
By: Michael J. Weitzner, Esq.

For the defendant

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[3] RONALD L. KEYSER,

being first duly sworn, deposes and says as follows, in answer to

EXAMINATION BY MR. WEITZNER:

Q Could you state your name and address for the record, please.

A Ronald L. Keyser, 1931 St. Clair Drive, Pekin, Illinois, is my residence. And 4th and Broadway Building, Pekin, Illinois, is my office address.

Q O.K., and what is your profession?

A I'm an attorney.

Q And how long have you been engaged in the practice of law?

A Since October. . . . I was admitted to the bar in October of 1957 and have practiced continuously since that date, with the exception of some time, I think about fifteen months, on active duty with the Army.

Q And do you practice litigation at all?

A Yes.

Q O.K., so that I take it there's little need for me to explain to you the nature of a deposition and [4] my role here.

A I have taken depositions.

Q O.K. If you don't understand any of my questions, however, please stop and ask for an explanation. Do you also practice in the field of probate matters and administration of estates?

A Yes.

Q And what experience have you had in these matters? Just generally.

A Well, I'd say that our practice is primarily real estate, probate and tax oriented.

Q And I take it then you're familiar with the federal estate tax?

A Yes.

Q And you do know a Mr. Robert Boyle?

A Yes.

Q And have you or your firm been retained by Mr. Boyle with respect to the administration of the Estate of Myra W. Boyle?

A Yes.

Q When were you first retained by Mr. Boyle?

A It would have been shortly after her death. The exact date, I'd really have to refer to perhaps [5] some time cards to tell you that date. Or if you could suggest a date?

Q Well, I would suggest that it was September 14, 1978.

A I would say that's approximately correct.

Q O.K. At the time, did you represent Mr. Boyle with respect to any other matters?

A I had not represented him . . . I had in the past represented him on some personal matters.

Q O.K.

A Primarily involved a personal injury suit insofar as his daughter was concerned, and also they had a company called Hugh Boyle & Sons that I did work for the company.

Q Had you also in the past been retained to represent Mr. Boyle in his role as executor of the estate of his father?

A No, I hadn't.

Q O.K.

A It may have been that the firm may have done that through Mr. Elliff a number of years before, but I had not.

Q Upon first being retained by Mr. Boyle, and this is [6] solely with respect to the administration of the Estate of Myra Boyle, did you have any discussions with Mr. Boyle about his duties or responsibilities as executor?

A Yes. We talked generally, primarily in regard to being certain to keep accounting records, expenses and disbursements, how we'd handle the transfer of funds into the executor's account.

We discussed the provisions of the will, we discussed the probabilities of the federal estate tax return having

to be filed and a tax being due, as well as an Illinois inheritance tax.

And we discussed the matter of the contemplated sale of the farmland that Mrs. Boyle owned and the residence that she owned in Mackinaw or . . . Mackinaw or Tremont. I'm not quite sure which town it was. I think it was Tremont.

Q When did you first learn of the nature and extent of the assets of the estate?

A Within a short time after I talked with him. I knew from the start there would be a federal estate tax and an Illinois inheritance return due.

Q You stated that you discussed with Mr. Boyle the [7] probability of filing the—

A Uh-huh, yes.

Q —estate tax returns. Did you inform him that, in fact, the returns would be required?

A I really . . . that they would be required. . . As I recall, I told him that I felt that they would be required, but we wouldn't be able to determine the exact amount that would be involved until after the sale of the farmland.

Q O.K.

A I, further, do not ever recall telling him the date by which it had been filed.

Q "Had been filed?" I take you mean you don't recall telling him the date that—

A That he had to file it by.

Q O.K.

A No.

Q Did Mr. Boyle ever inquire of you as to whether there was a due date with respect to—

A Both.

Q —federal estate tax returns or—

A Most of the time, Mrs. Boyle would call and indicate that Bob had asked her to call. And she called [8] several times and I recall Bob calling or talking with Bob several times, and I told him that we would take

care of it and I would let him know when it was the appropriate time to do it and that I would prepare the documents.

Q O.K. Did Mrs. Boyle ever inquire as to any specific due date with respect to the—

A Not as a—

Q —federal . . . excuse me . . . federal estate tax return or the Illinois inheritance tax returns?

A Mrs. Boyle inquired, wanting to know had we done anything on it and would it be taken care of. And again, my response to her was that it hadn't been done and that we would take care of it when it was due.

Q So, I take it, she didn't inquire as to any specific due dates?

A No, but she certainly wanted to know when I was going to get it done.

Q O.K., and you didn't take it upon yourself to inform her as to any specific due dates?

A No, I really didn't.

Q O.K. Did any other attorneys employed by Elliff [9] and Keyser, et al have any role in the handling of the estate's affairs?

A Yes, Pat Oberle, O-b-e-r-l-e, was involved. I think I was out of town when the sale of the farmland and I think of the house . . . no, the farmland I believe was completed and I think he actually closed that sale, and I'm not sure if he closed the sale of the house or if I did.

Also, I had given the estate file to Mr. Oberle to take care of some fiduciary income tax returns. And beyond that, I don't think anybody else was involved.

Q O.K. Did you prepare—

A Some others may have done odds and ends from time to time, but I don't think so.

Q O.K. Did you request assistance from any attorneys in the . . . oh, for work on the income tax return?

A Yes.

Q And that was Mr. Oberle?

A Yes.

Q Do you know. . . Is Mr. Cherle still employed at this firm?

A Yes.

[10] Q Do you know whether or not he had any discussions with Mr. or Mrs. Boyle regarding Illinois inheritance tax returns or federal estate tax returns?

A Not to my knowledge.

Q Is it the custom and practice of your office to keep records of services performed for clients for purposes of billing?

A We attempt to keep time cards. We attempt to keep time cards.

MR. WEITZNER: Off the record.

(discussion off the record)

Q Who would have been responsible for maintaining these office time card records with respect to this estate?

A At that time, and to the present time, we had a procedure whereby each attorney has a clipboard and on the clipboard are a series of cards, maybe three by eight inches, nine inches, something like that, and we would write down the date, the name of the attorney performing the service, the name of the client or the estate, and then a very brief description of what was done and then record a period of time in multiples of a quarter of an hour on that [11] time card.

At the end of the day or maybe after several days' accumulation, those cards would be left with one of the girls who was designated to file them back in a file tray maintained for each lawyer.

Q O.K. Is it the custom to keep records pursuant to this system of telephone calls with clients?

A Well, as I indicated, we attempt to keep a record of what we do. Since we do not always bill estates on an hourly basis, there are probably more phone calls missed on estates than there are on some of the other types of work.

But I would say that. . . I'd hate to estimate the number of hours that we lose a year by not recording phone calls. We do some and some we don't.

Q And the—

A And the reason we may not is that we may get two or three phone calls right on top of the other and we just don't get the time or take the time to write it down.

Q After the sale of the real estate belonging to the estate, do you recall when you next had any conversations with either Mr. or Mrs. Boyle?

[12] A I really. . . You know, as I sit here, I really don't. I think that was probably the last thing to be accomplished in the estate, with the exception of the federal and Illinois tax returns and the various income and fiduciary tax returns.

But to be specific, I really don't. . . You know, I'm sure I did, but I don't know when.

Q Do you recall whether or not the Myra Boyle Estate was required to file an Illinois inheritance tax return?

A Yes, it was.

Q And when are those returns due?

A Those are due ten months from the date of death. Payment is due ten months from the date of death.

Q And was the Illinois inheritance tax return timely filed?

A No, it was not.

Q And do you recall when it was filed?

A It was filed at approximately the same time, I think, as the federal estate tax return was filed, which was sometime in the middle of September of 1979, I think.

MR. WEITZNER: O.K., I have a document that I'd [13] to get marked as Defendant's Deposition Exhibit number 1.

(Whereupon the document heretofore referred to was marked Defendant's Deposition Exhibit number 1 for purposes of identification)

Q O.K., sir, I hand you what's just been marked as Defendant's Exhibit 1 for the deposition. I ask you to identify it, please.

A Yes. This is some correspondence from the Illinois Attorney General's Office that they normally send to us along with the. . . I believe when they send us the Inheritance Tax Consents that we request when we send in a Form 600 at the beginning of the estate.

Q Now, you say that they send to—

A To us.

Q You mean this document is sent to your law firm?

A Yes.

Q Not to the executor?

A Not to the executor, no. They send this document. We send in a Form 600 in which we request consents for the transfer of the various bank accounts. We [14] prepare the consents, we send them to the Attorney General's Office and the Attorney General's Office countersigns those consents, returns them to us. And that's the type of letter that normally comes back with the consents.

That would indicate to me we probably applied for the consents sometime in early October.

Q Of 1978?

A '78, uh-huh.

Q Do you send copies of these documents, the Form 600, to your clients?

A No. Oh, no, no. That's a form that's directed to the Attorney General. That form is signed by the client, however.

Q The Form 600?

A Yes.

Q O.K.

A That's a normal letter that we get in every estate, whether they're. . . Whenever we send in for the tax consents.

If the Form 600 shows that an Illinois inheritance tax is not likely due, they may not send that specific letter. I really can't recall right now.

[15] Q Did you discuss this letter with Mr. Boyle or Mrs. Boyle?

A Oh, I'm sure I didn't.

When we receive those letters, we customarily then give the consents that are returned to us either to the executor to go to the various banks to transfer the bank accounts o. else we will forward them to the various banks with a letter that the executor will be in to transfer the accounts into the executor's name or that a surviving joint tenant might be in to transfer the account into the survivor joint tenant's name.

Q Did your firm prepare other tax returns for the estate in question?

A We prepared some fiduciary income tax returns and I. . . I'd have to check to see if we did the decedent's final return. I really don't recall if . . . if a CPA might have done that decedent's final return or if we did.

But I know we prepared some fiduciary returns. That's what Mr. Oberle, I think, would have done, and maybe I prepared one or two. I'm not certain.

Q Were these returns forwarded to Mr. Boyle for his [16] signature?

A He would have signed the returns as executor.

Q O.K. Did you discuss with Mr. Boyle or his wife whether or not there were due dates with respect to these income tax returns?

A You know, I. . . I have difficulty in saying really yes or no. I would suspect that we may have discussed some accounting periods. I don't recall without looking at them if we filed on a calendar year or if we had a fiscal year.

If we had a fiscal year, I would have assumed he would have talked about it. You know, the different filing date.

Mr. Boyle really wasn't very adept at things of that nature.

(discussion off the record)

Q Sir, by examination of the time records kept by your firm, would it be possible for you to tell what work was performed by your firm immediately prior to the filing of the estate tax returns in question?

A Well, the cards which . . . the time cards which you have just shown me that have come from your records [17] show an April 9, 1979, where I did some work in an income tax return. I assume that would have been a . . . I can't really. . . I would assume that would have been a fiduciary income tax return for the estate and that would appear, at least according to the these time cards, to have been the last work.

Q That is the last work up to the preparation of the returns—

A As far as I can tell from these—

Q —in question?

A —time cards.

Q O.K.

A And that could have very well have been the case.

MR. WEITZNER: I have no further questions.

FURTHER DEPONENT SAYETH NOT

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

Civil Action Number 81-1078

ROBERT W. BOYLE, Executor of the Estate of
MYRA W. BOYLE, Deceased, PLAINTIFF

—*vs*—

UNITED STATES OF AMERICA, DEFENDANT

THE DEPOSITION of ROBERT W. BOYLE, plaintiff in the above entitled cause, called on behalf of the defendant, before me, Grace Cafaro, CSR, RPR-CP, a Notary Public in and for the County of Peoria and State of Illinois, at 4th and Broadway Building, in the City of Pekin, County of Tazewell and State of Illinois, on the 11th day of November, A.D. 1981.

[2] APPEARANCES:
Elliff, Keyser, Oberle & Davies, P.C.
4th and Broadway Building
Pekin, Illinois 61554
By: William L. Kasley, Esq.

For the plaintiff

United States Department of Justice
Tax Division
Washington, D.C. 20530
By: Michael J. Weitzner, Esq.

For the Defendant

• • • •

[3] ROBERT W. BOYLE,

being first duly sworn, deposes and says as follows, in answer to

EXAMINATION BY MR. WEITZNER:

Q O.K., Mr. Boyle, first, sir, have you ever testified before at a deposition or trial in any matter?

A Yes, sir.

Q O.K. Can I ask just a little bit, was that a deposition or a trial, or both?

A Deposition, and then I was called to the trial.

Q O.K.

A My brother was hurt in an accident.

Q O.K., so that was a civil matter?

A Yes.

Q And no government agency was a party to that proceeding?

A No.

Q O.K. Well, just so you'll be slightly more familiar with the procedure, let me explain what happens. I'm just going to ask you some questions about your recollection of the events in the administration of the Estate of Myra W. Boyle. Please answer to the [4] best of your ability. If you don't understand some of my questions, please stop me and ask me to explain and I'll be happy to try and make myself clear. Otherwise, just go ahead and answer the question to the best of your ability.

If you answer, I guess the only thing that we can do is assume that you understood the question.

A Yes.

Q Well enough. If at any time you want to stop and take a break, that will be fine. But I don't suspect that we'll take more than an hour this morning.

First, I requested some documents regarding the administration of the estate and I was wondering if you had any documents in your possession regarding the preparation of the estate tax returns or income tax returns, or Illinois tax returns of the Estate of Myra W. Boyle? Or any records or notes that you have regarding conversations or, you know, anything in the performance of your duties as executor.

A They might be at home.

Q O.K. What type of documents would you have?

[5] A Well, I wouldn't have any idea. My wife files everything when we get it.

MR. WEITZNER: O.K., If I could just speak then to you, if I may.

MR. KASLEY: Sure.

MR. WEITZNER: I'm sure you understand that we did request some documents—

MR. KASLEY: Yes.

MR. WEITZNER: —from the executor.

MR. KASLEY: I have no reason to think that there are any documents or materials available other than those that were in our files. I have provided you with all the materials we have concerning prepartion of the estate tax return.

We do have additional materials available concerning preparation of income tax returns and inheritance returns for the State of Illinois, if you would like to review those.

All of the correspondence between the executor and the attorney, we make copies of the correspondence that we submit to the executor, and you have been provided with those.

[6] MR. WEITZNER: Does that include correspondence relating to the income tax returns and Illinois returns?

MR. KASLEY: Yes. We do have additional materials available, if you would like to see those.

MR. WEITZNER: O.K.

MR. KASLEY: I don't know that there is anything of any real consequence, but I'd certainly be more than willing to make any of those materials available to you.

MR. WEITZNER: O.K., maybe I'll look at those later.

With respect to these. . . What do you call them? Time sheets?

MR. KASLEY: Time cards.

MR. WEITZNER: . . . time cards, I imagine this is a complete set of your records with respect to the administration of this estate?

MR. KASLEY: To the best of my knowledge, that would be correct.

MR. WEITZNER: O.K.

Q Mr. Boyle, what has been your business experience?

A From '46 until '76, I and my two brothers and my [7] father, as long as he was alive, were in the earthmoving business. And from '46 to '64, we also farmed between five hundred and a thousand acres.

Q Prior to 1946, I imagine you were in the military?

A Yes, sir.

Q And in 1964 to the present, what has been your experience?

A From '64 till the end of '75, we were in the earthmoving business and we sold out. And since '76, I have been employed at the nuclear power plant at Clinton, Illinois.

Q O.K. What are your duties or responsibilities at the nuclear power plant?

A Operating engineer.

Q And what type of training is necessary for that?

A Union card.

Q Do you have any college courses? Have you taken any college courses?

A I attended college one year.

Q And when was that?

A 1936, '35-'36.

Q What were your duties and functions with respect to the earthmoving business that you operated? [8] And please don't go all the way back to 1946. Just, you know.

A Well—

Q —three or four years prior to—

A I would say superintendent.

Q —that you were in business?

And until what year was your father active in the business?

A He was never really active. He passed away in, I believe it was, '57.

Q Was the earthmoving business operated as a corporation?

A Yes.

Q And were you a shareholder?

A Yes.

Q Were your brothers also shareholders?

A Yes, sir.

Q Did you hold a position with the corporation? What was the name of the corporation?

A Hugh Boyle & Sons, Inc.

Q What position did you hold with the corporation?

A President.

Q And how long did you hold that position?

[9] A From the time we incorporated 'till we quit business.

Q O.K., so that was until 1975?

A Fall of '75.

Q Were you also treasurer?

A No, sir.

Q Was that one of your brothers—

A Yes.

Q —that was treasurer?

A Yes.

Q Where did this corporation operate? In Central Illinois?

A Yes, Mackinaw, Illinois.

Q And as President, were you responsible for preparing and submitting bids for contracts?

A Partially.

Q You shared that responsibility?

A Yes.

Q With whom?

A My brother and my wife done all the bookwork.

Q How many employees did the corporation have?
A Seasonal. Maximum of, I would say, twenty.
Q And who prepared payroll records for the corporation?
A My wife.
[10] Q O.K. Was she responsible for preparing salaries and wages, paying wages?
A Yes.
Q O.K. Who was responsible for preparing any tax returns due for the corporation?
A Our auditor.
Q And who was your auditor?
A Well, it used to be Fort & Warner at Morton, but also Peat, Marwick & Mitchell.
Q That's in Peoria?
A Yes.
Q Who signed those tax returns for the corporation?
A I, as President, or my brother as Secretary-Treasurer. I don't recall just exactly.
Q Who had the authority to sign checks for the corporation?
A I and my brother.
Q Not your wife?
A No.
Q O.K. Mr. Boyle, do you prepare you own personal income tax returns?
A No, sir.
Q O.K., those are also prepared by an auditor for you?
[11] A Yes.
Q And who would that be?
A My wife takes care of that. I don't . . . I can't tell you the name of who it is now.
Q O.K. Are those personal income tax returns submitted to you for your signature?
A Yes, sir.
Q With respect to income tax returns for your corporation and for your personal income tax returns, as

well, are you aware of any due date for filing those documents?
A I never pay any attention to that. My wife looks after that and gets it in in plenty of time.
Q Do you know when the individual income tax return is due?
Your answer is no?
A I don't. I couldn't say the exact date. I know it's in the springtime.
Q O.K. How about the corporate income tax return?
A I have no idea when that was due.
Q O.K. If we can just turn back quite a few years now to the time of the death of your father. That was Hugh Boyle was his name?
[12] A Yes, Hugh.
Q O.K. Did you serve as executor—
A I did.
Q —for his estate?
A Yes.
Q Do you recall whether or not that estate was required to file any federal estate tax returns?
A I wouldn't know exactly.
Q So you have no recollection?
A No. All I done was sign the papers that Mr. Keyser prepared for me.
Q O.K. I think we're all set now to turn to the administration of the estate of your mother, Myra Boyle. Do you recall when it was your mother passed away?
A It was September.
Q Of 19 . . .?
A 1978.
Q O.K., and do you recall whether or not your mother left a will?
A She did.
Q And are you familiar with that document?
A Yes, sir.
[13] Q Did the will name you as executor of the estate?

A It did.

Q And you took action to become appointed executor. Is that correct?

A Contacted Mr. Keyser.

Q All right.

A He was there when the will was read and, so, he just went ahead with it.

Q I take it that you employed Mr. Keyser—

A Yes.

Q —for this purpose?

A Yes.

Q O.K. Did you have any discussions with Mr. Keyser or . . . Well, strike that.

First, let me say, did you have any dealings with any other attorneys from the firm of Elliff-Keyser?

A The day that we settled up for the land, if I remember correctly, Ron wasn't here, Mr. Keyser wasn't here, and some other attorney took care of that.

Q But you dealt solely with Mr. Keyser with respect to estate matters?

A Yes, sir.

[14] Q Did you have any discussions with Mr. Keyser regarding what your duties or responsibilities would be as executor?

A No, sir.

Q Had you had any discussions regarding the duties of executors at the time you served as executor of your father's estate?

A Well, I would say that all I done was do as he told me to do.

Q Did you make any inquiries of Mr. Keyser regarding what duties or responsibilities were those of the executor?

A No, sir. I though that he would tell me everything to do. I had all the confidence in the world in him.

Q Did you supply Mr. Keyser with your records or records of your mother so that he could properly assist in administering the estate?

A Whatever he asked for.

Q O.K. Do you recall specifically what records those may have been?

A No, sir.

Q You mentioned previously that there was a sale of [15] real estate?

A Yes, sir.

Q O.K. Can you just briefly tell me what real estate that was?

A Well, she owned 136 acres of ground in one plot and the other she had a life estate in 120 acres, plus a house in Mackinaw.

Q O.K. The property that you referred to about acreage, is that farmland?

A Yes.

Q And the house was your family home?

A It was her home.

Q Her home. And all of these parcels of property were sold. Is that correct?

A Yes, sir.

Q And did you have any discussions with Mr. Keyser regarding the sale of this property?

A Yes, sir.

Q O.K. Do you recall any of those discussions?

A Well, one Saturday we talked with he and the auctioneer and set the sale date. And at the sale, he had all the documents needed to . . . for the purchaser to sign.

[16] Q Did you make any inquiries of Mr. Keyser regarding income tax matters of the estate?

A I don't think I made any inquiries of him at all. I tried to do as he said and I got . . . I was anxious the next summer and I had my wife call several times and they said they'd take care of it in plenty of time.

Q Take care of what?

A Taxes.

Q You're talking about income taxes?

A Inheritance tax, I thought.

Q Do you recall when those calls were made? You said in the summer. Would that have been—

A No, sir, I can't tell you exactly.
Q O.K. Would that have been the summer of 1979?
A Yes.
Q Do you know with whom your wife spoke?
A No.
Q O.K. Correct me if I'm wrong, but I asked you before about . . . with reference to your father's estate whether or not that estate required to file federal estate tax return, and I believe that you had no recollection. Is that correct?
[17] A I have no recollection of that.
Q Did you discuss with Mr. Keyser whether or not the estate of Myra Boyle would be required to file a federal estate tax return?
A Yes.
Q And do you recall when you had those discussions?
A Shortly after the sale of real estate.
Q You don't recall the month—
A No, sir.
Q —by any chance?
A I think it was the day that we sold the real estate.
Q O.K. In your affidavit it says the closing of premises took place in the spring of '79. Does that refresh your memory about when these conversations may have taken place?
A He wasn't . . . He wasn't here the day we sold the property . . . settled for it.
Q O.K., and what conversations did you have with Mr. Keyser regarding whether or not an estate tax return was required?
A I couldn't be specific.
Q Did you ask Mr. Keyser whether or not a return was required?
[18] A I don't recall that. I left everything up to him. He would tell me what to do.
Q O.K. Did he tell you that a federal estate tax return was required?
A He must have because I knew that one should be paid within a year. I didn't know when.

Q You say you didn't know when. That means you didn't know the specific due date?
A I didn't know what date it was.
Q Did you ever ask Mr. Keyser when the return was due?
A Not until September the next year.
Q September of 1979?
A '79.
Q On any prior occasion, prior to September '79, did you ask Mr. Keyser when the estate tax was due?
A I don't think I ever talked with Mr. Keyser from the day that the real estate was sold (Spring, 79) until September of the next year. My wife talked with him several times, or someone in the office.
Q Did you have discussions with your wife about administration of the estate?
A Naturally.
[19] Q All right.
A To a small extent.
Q O.K., and you stated that on occasion your wife made telephone calls to the office of Elliff and Keyser—
A Yes.
Q —to question about the administration of the estate. Is that correct?
A Yes, sir.
Q O.K. Did you have discussions with her about what she discovered pursuant to those conversations?
A No. It's always her opinion, "don't worry," that Ron Keyser will take care of everything.
Q Do you know whether your wife asked about a specific—
A No, sir.
Q —due date?
Now, is that you don't know whether she asked or—
A I don't think she did because she didn't know the next fall when it was due, when we discovered that it was late.

Q Other than the federal estate tax return, did you, as executor, file any other returns, tax returns, [20] for the estate, either state returns or federal returns?

A I remember we filed an income tax return.

Q And do you recall when that was?

A No, sir.

Q Who prepared that?

A Mr. Keyser.

Q Do you know whether that was timely filed or not?

A I wouldn't know.

Q Do you know whether there are due dates for filing of income tax returns?

A I don't know when they are. I never worry about that.

Q But you do know that due dates exist?

A Yes, but I don't know when.

Q Have you retained the firm of Elliff and Keyser in the past to perform services for you?

A Yes, since I would say, Elliff and Elliff and Elliff, and then Elliff, Elliff and Keyser. Since, oh, I can recall my grandfather coming here in the '20s.

Q And you had every reason to believe that they would handle—

[21] A That's right.

Q —matters in a competent way?

A Yes.

MR. WEITZNER: O.K., I have no further questions.

(discussion off the record)

EXAMINATION RESUMED BY MR. WEITZNER:

Q Mr. Boyle, just so the record is complete, will you please state your name and your current address so it appears on the transcript?

A Robert W. Boyle, Box number 3, Mackinaw, Illinois 61755.

Q What happens next, Mr. Boyle, is that a written transcript of the deposition will be prepared from the stenographic notes and you will get an opportunity to review the original transcript and check and see that there aren't any errors. There may be errors in the transcription process or you may have misstated an answer that you wish to correct. What you will do then, if you do want to make any corrections or additions, please prepare an addendum sheet showing . . . something to attach to [22] the deposition, something which says on line so and so on the following page where it reads . . . I meant to say or should have been recorded as follows, just put your changes and any explanation that you have. And then you'll be asked to sign it and return it.

I'll get a copy of that which will be sealed, that's the original, and that will be filed with the court if the need for that arises.

(discussion off the record)

Q Mr. Boyle, do you usually conduct business over the telephone?

A No, sir.

Q Is there any reason for that?

A Hearing deficiency.

MR. WEITZNER: O.K., that's all. Thank you.

FURTHER DEPONENT SAYETH NOT

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

No. 81-1078

ROBERT W. BOYLE, Executor of the Estate of
MYRA W. BOYLE, Deceased, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

[Filed Dec. 1, 1981]

MOTION FOR SUMMARY JUDGMENT

Now comes Plaintiff, ROBERT W. BOYLE, Executor of the Estate of Myra W. Boyle, Deceased, by his attorneys ELLIFF, KEYSER, OBERLE & DAVIES, P.C., and moves the Court to enter summary judgment in Plaintiff's favor pursuant to Rule 56 of the Federal Rules of Civil Procedure, for the relief prayed for in the Complaint on the ground that there is no genuine issue as to any material fact, and that the Plaintiff is entitled to a judgment as a matter of law, and in support thereof states as follows:

1. That this Complaint is an action brought pursuant to the Internal Revenue Code, Title 26, Section 6651(a), and has as its basis Plaintiff's claim for a refund of an estate tax penalty paid pursuant thereto.

2. That Title 26, Section 6651(a) provides in pertinent part as follows:

> (a) Addition to the tax.—In case of failure to file any return under authority of subchapter A of chapter 61 (other than part III thereof), of subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), or subchapter A of chapter 53 (relating to machine guns and certain other fire-

> arms), on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate.

3. That the Courts in the Seventh Circuit have consistently held that the taxpayer is not subject to the penalty for the late filing of an estate tax return if (1) the taxpayer is unfamiliar with the tax law, (2) the taxpayer hires competent counsel to assist in preparation of the return, (3) the taxpayer makes full disclosure of all relevent facts to the attorney upon whom he relies, (4) the taxpayer has exercised ordinary business care and prudence in terms of keeping in contact with his legal representative concerning preparation of the return, and (5) the taxpayer does not have personal knowledge as to the actual due date for the estate tax return. *Giesen v. United States*, 369 F. Supp. 33 (W.D. Wis. 1973). *Gray v. United States*, 453 F. Supp. 1356 (W.D. Mo. 1978). *Rohrabaugh v. United States*, 611 F. 2nd 217 (7 Cir. 1979).

4. That the affidavit of Robert W. Boyle attached hereto and made a part hereof as Exhibit A, provides undisputed evidence that the taxpayer in the present case was unfamiliar with the tax law, retained counsel for purposes of preparing an estate tax return for the estate, provided the attorney with all necessary documents for the preparation of the return, kept in contact with the attorney as to the filing of the estate tax return and otherwise exercised ordinary business care and prudence in the handling of the estate, and was unaware of the due date for the estate tax return until after said date had past.

5. That attached hereto and hereby made a part hereof as Exhibit B is the affidavit of Ronald L. Keyser, attor-

ney for the estate, which sets forth uncontradicted facts that he was provided with all necessary materials by the executor for the preparation of the Federal Estate Tax Return, that the executor contacted him concerning the preparation of the same on a regular basis, that he at no time provided the executor with the due date for the return until after said return was past due, and that he has otherwise has skill and expertise in the handling of such estates and failed to prepare and advise the executor as to the due date of the estate tax return in this matter as a consequence of another attorney within his firm performing legal services for the estate and the unexplained failure to list the estate on his estate master calendar which lists the filing dates for various estate tax returns.

6. That attached hereto and hereby made a part hereof as Exhibit C is a Memorandum of Law which supports the Plaintiff's position herein.

WHEREFORE, on the basis of the foregoing, Plaintiff prays that this Court grant its Motion for Summary Judgment as to this Complaint and enter an Order in Plaintiff's favor and against the Defendant in the amount of $17,124.45, interest, and costs and fees expended by Plaintiff in pursuit of this claim.

ROBERT W. BOYLE, Executor of
the Estate of Myra W. Boyle,
Deceased, Plaintiff,

By ELLIFF, KEYSER, OBERLE &
DAVIES, P.C.

/s/ William L. Kasley
One of Its Attorneys

ELLIFF, KEYSER, OBERLE & DAVIES, P.C.
Fourth & Broadway Building
Pekin, Illinois 61554
309/346-4148

[EXHIBIT A]

AFFIDAVIT

STATE OF ILLINOIS)
) ss.
COUNTY OF TAZEWELL)

The undersigned, ROBERT W. BOYLE, having been first duly sworn on oath deposes and says:

1. That he is 64 years of age, is a resident of the Village of Mackinaw, Tazewell County, Illinois, is of legal age and under no disability and makes this affidavit on personal knowledge.

2. That he is a son of Myra W. Boyle who died on the 14th day of September, 1978, leaving a Last Will dated June 6, 1974, a copy of which is attached hereto and incorporatetd by reference herein as Exhibit A.

3. That he was appointed Executor of the Last Will of said Myra W. Boyle on the 2nd day of October, 1978, by the Circuit Court of the Tenth Judicial Circuit of Illinois and is now and has ever since his said appointment been the duly qualified and acting Executor of the Last Will of Myra W. Boyle, deceased.

4. That Decedent was a resident of the Village of Mackinaw, County of Tazewell, State of Illinois, at the time of her death, and left as her sole heirs the following named children: Charles B. Boyle, Robert W. Boyle, Grover J. Boyle, and Dorothy Neathery.

5. That the following are the decedent's heirs, legatees and devisees under said Last Will: Charles B. Boyle, Robert W. Boyle, Grover J. Boyle, Dorothy Neathery, and First Farmers State Bank of Minier as trustee.

6. That at all times immediately prior to and to the date hereof Ronald L. Keyser of the firm of Elliff, Keyser, Oberle & Davies, P.C., Fourth & Broadway Building, Pekin, Illinois, has been retained and has been acting as my attorney as such Executor in connection with all matters pertaining to the estate of the said Myra W. Boyle including the preparation of the Federal Estate Tax Return for said decedent's estate.

7. That at the time of the death of the said Myra W. Boyle she was the owner of certain real estate and that said premises were offered for sale at public auction and that the closing of said premises took place in the spring of 1979; that upon admission of the said decedent's Will to probate and the appointment of the undersigned as Executor therein, the undersigned was advised by the said Ronald L. Keyser that Federal estate and Illinois inheritance tax were due in this estate and that said attorney would let the undersigned know in sufficient time as to when the Federal Estate Tax Return and death taxes would have to be filed and paid.

8. That the undersigned met with his attorney on a regular basis in the administration of this estate, including meetings in the spring of 1979 for the sale of real property by the estate and for the execution and filing of estate income tax returns.

9. That the undersigned had been engaged in grading and road construction from 1946 to 1976, but does not have any legal, accounting or like background. All bookkeeping, payroll, and accounting work for said business was performed by the undersigned's wife and/or accountant. That the undersigned had no personal knowledge as to when any corporate income tax returns were due.

10. That the undersigned acted as an executor on only one prior occassion, upon the death of the undersigned's father in 1957, but has no personal recollection as to whether or not a Federal Estate Tax Return was prepared for that estate. That the undersigned had no background in this area, and relied on Ronald L. Keyser to tell him whether an estate tax return had to be filed and if so, when it would be due.

11. That the undersigned does not prepare his individual income tax returns but has them prepared by his accountant. The undersigned is unaware of the exact filing date for said personal income tax returns but knows that said return is due sometime in the spring of each year.

12. That the undersigned did on a number of occassions including the spring and summer of 1979 personally

and by his wife specifically ask when the return was due, but was only advised by the attorneys he had retained that he would be notified in due course as to the due date.

13. That having not heard from said attorney as to the filing date, the undersigned did on or about September 6, 1979, personally call the said attorney and was advised by the said attorney that the return was past due and immediately thereafter made an appointment with the attorney for September 11, 1979, to proceed with the preparation of the tax return.

14. That on or about Wednesday, September 13, 1979, the undersigned executed the Federal Estate Tax Return and request for early audit and delivered the check in payment thereof to said attorney and at which time the said attorney advised the undersigned he would mail the return, check and request for early audit that day.

15. That the firm of Elliff, Keyser, Oberle & Davies, P.C. with which the said Ronald L. Keyser is a partner had previously handled the undersigned's deceased father's estate a number of years prior hereto and the undersigned had no reason to believe that the said firm and the said Ronald L. Keyser would handle this estate in any improper manner and that said firm has been established in Tazewell County, Illinois for a continuous period of over 50 years and had specialized primarily in real estate and probate work; that the undersigned furnished all information which said attorneys requested in connection with the preparation of said Federal Estate Tax Return several months prior to what the undersigned subsequently found to be the due date of the Federal Estate Tax Return.

16. That said Federal Estate Tax Return was filed on September 13, 1979, with the Internal Revenue Service, and the decedent's estate paid Federal estate tax in the amount of $85,622.26 at that time, as evidence by Exhibit B attached hereto.

17. That on February 9, 1980, the undersigned on behalf of this estate and pursuant to a notice from the

Internal Revenue Service received by the undersigned in October, 1979, paid an estate tax penalty in the amount of $17,124.45 and interest of $1,326,56, as evidence[d] by Exhibit C attached hereto.

18. That on February 9, 1980, the undersigned on behalf of this estate filed a claim for refund with the Internal Revenue Service demanding refund and payment of the $17,124.45 estate tax penalty paid on this estate. To date, the undersigned has received no notice of any action on this claim by the Internal Revenue Service.

19. That the undersigned first learned that the estate tax return was past due on September 6, 1979, when he contacted his attorney concerning preparation of the same, and the undersigned had no personal knowledge as to the exact due date for said return until that time.

Dated this 30th day of November, 1981.

/s/ Robert W. Boyle
ROBERT W. BOYLE

SUBSCRIBED AND SWORN TO BEFORE ME this 30th day of November, 1981.

/s/ Carla J. Ingersoll
Notary Public

[Exhibits to affidavit omitted]

[EXHIBIT B]

AFFIDAVIT

STATE OF ILLINOIS)
) ss.
COUNTY OF TAZEWELL)

The undersigned, RONALD L. KEYSER, having been first duly sworn on oath deposes and says:

1. That he is 47 years of age and is a resident of the City of Pekin, Tazewell County, Illinois, is of legal age and under no disability and makes this affidavit on personal knowledge.

2. That he was licensed to practice law on the 16th day of October, 1957 and with the exception of 15 months in the military service of the United States during the years 1957 and 1961 he has been engaged in the active practice of law in the State of Illinois.

3. That he is a partner in the firm of Elliff, Keyser, Oberle & Davies, P.C. at Fourth & Broadway Building, Pekin, Illinois, and has been such a partner for more than ten years last past.

4. That the undersigned affiant during his years of practice has been engaged in a general practice with emphasis placed on real estate and probate matters and that the firm of Elliff, Keyser, Oberle & Davies, P.C. has been in existence for more than 70 years having been started by John T. Elliff, the father of Nathan T. Elliff, one of the affiant's legal partners, and that said firm has consistently during said years been engaged in the general practice of law with a heavy emphasis upon real estate and probate law.

5. That affiant in 20+ years of practice has never missed the filing of a Federal Estate Tax Return within the time required by law.

6. That the undersigned firm was hired by Robert W. Boyle to handle the probate and Federal Estate Tax mat-

ters pertaining to the Estate of Myra W. Boyle and repeatedly advised the Executor of said estate that said firm would notify said Executor of the date on which said Federal Estate Tax Return must be filed and the tax therein paid.

7. That at the time said Federal Estate Tax Return was due in July of 1979 and for some time prior thereto affiant's said law firm consisted of six lawyers and was in the process of obtaining the employment of an additional attorney because of the large workload of said firm.

8. That at the time of the death of the decedent herein referred to and at all times subsequent thereto it has been the general and standard procedure that the due dates of all Federal Estate Tax Returns in all estates in which the office is involved were to be posted on a master calendar by the secretary of the attorney having prime responsibility for the particular estate and that the attorney is then advised at least ten days prior to the filing of said return by his secretary of the due date.

9. That the estate of the undersigned affiant was not listed upon said calendar and the reason for which is unknown to affiant or anyone in affiant's firm.

10. That affiant had in the early spring of 1979 requested assistance from another attorney in said firm for the purpose of working on the decedent's Federal income tax return and for the purpose of assisting in the closing of an estate real estate property sale and that said file remained in said other attorney's office for sometime thereafter.

11. That during the spring and summer of 1979, the undersigned was contacted by the executor herein or his wife on several occasions and said executor was told that the undersigned would prepare the Federal Estate Tax Return and have him sign the same and pay the tax in due time.

12. That to affiant's knowledge, the undersigned did discuss with the executor the necessity of filing a Federal

Estate Tax Return but never told the executor the exact due date.

13. That on or about September 6, 1979, Robert W. Boyle, Executor of the decedent's estate again called and requested information as to when the Federal Estate Tax Return was to be filed and it was at that time that affiant realized that the Federal Estate Tax Return had not been filed in a timely manner.

14. That immediately upon learning of the non-filing of said return, affiant immediately prepared the same and submitted it to the Internal Revenue Service at Kansas City, Missouri, on the 13th day of September, 1979 and saw to the payment of the tax on said date.

15. That the system maintained by said firm for the purpose of advising the respective attorneys of filing dates for Federal Estate Tax Returns has been effective in past years and to affiant's knowledge, this estate is the only estate not picked up by said system with the result that the Federal Estate Tax Return was not filed on time.

Dated this 30th day of November, 1981.

/s/ Ronald L. Keyser
RONALD L. KEYSER

SUBSCRIBED AND SWORN TO BEFORE ME this 30th day of November, 1981.

/s/ Carla J. Ingersoll
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

Civil Action No. 81-1078

ROBERT W. BOYLE, Executor of the Estate of
Myra W. Boyle, Deceased, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed Dec. 2, 1981]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The United States of America, by its attorney, Gerald D. Fines, the United States Attorney for the Central District of Illinois, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, hereby moves for summary judgment in its favor, and opposes the cross-motion for summary judgment filed by the plaintiff. As grounds for its motion and opposition, the United States of America alleges that there are no issues of material fact present, and that it is entitled to judgment in its favor as a matter of law.

The Government's memorandum in support is served contemporaneously, and incorporated by reference.

GERALD D. FINES
United States Attorney

By: /s/ Janet L. Jannuzi
Assistant United States Attorney

Of Counsel:
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Trial Attorney
Tax Division
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Washington, D.C. 20530
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SUPREME COURT OF THE UNITED STATES

No. 83-1266

UNITED STATES, PETITIONER

v.

ROBERT W. BOYLE, Executor of the Estate of
Myra W. Boyle, Deceased

ORDER ALLOWING CERTIORARI

Filed March 26, 1984

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Seventh Circuit* is granted.

PETITIONER'S

BRIEF

Office Supreme Court, U.S.
FILED
JUN 25 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1260

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT W. BOYLE, EXECUTOR OF THE ESTATE OF MYRA W. BOYLE, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

ALBERT G. LAUBER, JR.
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Washington, D.C. 20530
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BEST AVAILABLE COPY

QUESTION PRESENTED

Section 6651(a)(1) of the Internal Revenue Code imposes an "[a]ddition to the tax," often referred to as a "penalty," for failure to file a tax return on time, "unless it is shown that such failure is due to reasonable cause and not due to willful neglect." The question presented is whether a taxpayer's reliance on an attorney to prepare a tax return for him constitutes "reasonable cause" sufficient to defeat the late-filing penalty, where the return is filed late in part because of the attorney's negligence.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1266

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT W. BOYLE, EXECUTOR OF THE ESTATE OF MYRA W. BOYLE, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 710 F.2d 1251. The opinion of the district court (Pet. App. 21a-24a) is unofficially reported at 49 A.F.T.R.2d (P-H) ¶ 148,514.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17a-18a) was entered on June 24, 1983. A petition for

rehearing was denied on October 11, 1983 (Pet. App. 19a-20a). On December 30, 1983, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including January 29, 1984 (a Sunday). The petition was filed on January 30, 1984, and was granted on March 26, 1984 (J.A. 55). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Sections 6018, 6075 and 6651 of the Internal Revenue Code of 1954 (26 U.S.C.) are set out in a statutory appendix (Pet. App. 25a-26a).

STATEMENT

1. Myra W. Boyle died on September 14, 1978. Her will named her son, respondent Robert W. Boyle, as executor of her estate. Pet. App. 2a. Respondent was 64 years old at the time of his appointment and was then employed as an engineer at a nuclear power plant (Pet. App. 13a; J.A. 34). He had previously worked for Hugh Boyle & Sons, Inc., a family-owned earth-moving business that employed 20 persons (Pet. App. 12a-13a). He was a shareholder of that company, and had served as its president from 1946 until the business was sold in 1975 (J.A. 34-35).

As president of the family corporation, respondent had regularly signed corporate income tax returns prepared by the company's accountants (J.A. 36). He testified that he "ha[d] no idea" as to what the deadline for filing corporate tax returns was (*id.* at 37, 48). He was aware that there exists a specific date for filing individual income tax returns, but testified as to his ignorance of that date as well, appreciating only that individual returns are due "sometime in the spring" (*id.* at 36-37, 42, 48). He had served as executor of his father's estate some years earlier, but could not recall whether that estate had been required to file a federal estate tax return (*id.* at 37, 40, 48).

Shortly after his mother's death, respondent retained Ronald Keyser of the law firm of Elliff, Keyser & Hallberg to serve as attorney for the estate (Pet. App. 2a). Keyser had practiced law for 20 years, specializing in real estate and probate law (J.A. 15, 51). In discussing respondent's duties as executor, Keyser advised that the estate would be required to file a federal estate tax return (*id.* at 23-24, 40, 48, 52). Keyser also told respondent that there existed a specific deadline for filing the return, and said that he "would notify" respondent as to what the deadline was (*id.* at 15-16, 18-19, 48, 52). Respondent testified that he asked Keyser on several occasions what the filing date was, but was told only that he "would be notified in due course" (*id.* at 19, 48-49).[1] Keyser did not recall having informed respondent of the exact due date (*id.* at 24-25, 52-53). Respondent provided Keyser with the records and information necessary to administer the estate, and left preparation of the estate tax return entirely up to Keyser (Pet. App. 2a-3a; J.A. 38-39, 40).

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[1] The evidence was not entirely consistent on this point. In his two affidavits, respondent said that he "did on a number of occasions including late spring of 1979 specifically ask when the return was due" (J.A. 19, 48-49). In his deposition, however, he said that he did not ask Keyser when the return was due "until September * * * of 1979," that is, until after the filing deadline had already passed (J.A. 41). The district court did not make any findings on this issue.

Section 6075(a) of the Code[4] provides that an estate tax return "shall be filed within 9 months after the date of the decedent's death." Since Myra Boyle died on September 14, 1978, respondent as executor was required to file an estate tax return on or before June 14, 1979. The return, however, was not filed until September 13, 1979, some three months late (Pet. App. 22a). Keyser testified that the practice in his law office was to "post" the due date for a return on a "master calendar" so that the responsible attorney could be alerted at least ten days before the filing deadline (J.A. 16, 46, 52). According to Keyser, the Boyle estate "was not listed upon said calendar and the reason for [its omission therefrom was] unknown to [him] or anyone else in [his law] firm" (*ibid.*). Keyser also testified that his firm had a "large workload" (*id.* at 52) and that his files for the Boyle estate had been misplaced temporarily in another attorney's office (*id.* at 16, 46, 52). Respondent did not ask Keyser about the status of the return until September 6, 1979, by which time the return was already 11 weeks overdue (Pet. App. 3a).

2. Section 6651(a)(1) imposes an "[a]ddition to the tax," often referred to as a "penalty," for failure to file a tax return (including an estate tax return) on time. The penalty is 5% of the amount "required to be shown as tax on such return" for each month the return is delinquent, up to a maximum of 25% in the aggregate. The penalty is inapplicable unless the taxpayer demonstrates that his failure to file on time was "due to reasonable cause and not due to willful neglect" (*ibid.*). A delay is due to reasonable cause

[4] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

"[i]f the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time." Treas. Reg. § 301.6651-1(c)(1).

The Commissioner determined that respondent had not shown "reasonable cause" for filing the return late. Invoking Section 6651(a)(1), the Commissioner accordingly asserted against the estate an addition to the estate tax, in the amount of $17,124, for the three months that the return was delinquent (Pet. App. 3a).[5] Respondent paid the penalty and sued for a refund in the United States District Court for the Central District of Illinois, alleging that he had relied on Keyser to file a timely estate tax return and that such reliance constituted "reasonable cause" for the late filing (Pet. App. 22a-23a). The district court, on cross-motions for summary judgment, accepted respondent's argument. Although the court made no detailed findings of fact, it said that the facts of this case were "closely alligned [*sic*] to the facts" of *Rohrabaugh* v. *United States*, 611 F.2d 211, 217 (7th Cir. 1979), and relied on that decision in support of its result. Pet. App. 23a.

3. A divided panel of the Seventh Circuit affirmed (Pet. App. 1a-11a). The majority adhered to the standard set forth in *Rohrabaugh*, under which reliance on counsel constitutes "reasonable cause" for the late filing of a tax return if (Pet. App. 4a):

[5] The Commissioner also assessed the estate $1,226 in interest, at the then-prevailing annual rate of 6%, for the three-month period during which the estate tax payment was overdue. See I.R.C. § 6601(a); 26 U.S.C. (Supp. V 1981) 6621(b); Rev. Rul. 77-411, 1977-2 C.B. 480. Respondent did not contest the estate's liability for interest, and no question as to that liability is presented here.

> (1) the taxpayer is unfamiliar with the tax law; (2) the taxpayer makes full disclosure of all relevant facts to the attorney or accountant • • •; and (3) the taxpayer has exercised ordinary business care and prudence.

Emphasizing that this was a facts-and-circumstances test, the majority held that respondent had shown "reasonable cause." It noted that, while Boyle had business experience, his experience "did not encompass the preparation or filing of tax returns and therefore would not support any inference that he, in fact, knew the filing deadline" (Pet. App. 4a). It found that respondent had made full disclosure to the estate's attorney. And it held that respondent had exercised "ordinary business care and prudence" in hiring competent counsel, in maintaining contact with Keyser rather than "simply abandon[ing] the estate once he had delegated the legal functions," and in taking steps to ensure that the return was prepared promptly once he learned that the filing deadline had passed (*id.* at 4a-5a). The court distinguished its previous decisions that had rejected a "reliance on counsel" defense to the late-filing penalty, noting that the executor in those cases, while entrusting preparation of the estate tax return to an attorney, had actual knowledge of the return's due date (*id.* at 5a, citing *Fleming* v. *United States*, 648 F.2d 1122, 1126 (7th Cir. 1981), and *United States* v. *Kroll*, 547 F.2d 293 (7th Cir. 1977)). The court rejected as unpersuasive the reasoning of three other circuits, each of which "ha[d] unequivocally adopted a *per se* rule that reliance on counsel is not 'reasonable cause' within the meaning of [Section] 6651(a)(1)" (Pet. App. 5a, citing *Millette & Associates, Inc.* v. *Commissioner*, 594 F.2d 121 (5th Cir.), cert. denied, 444

U.S. 899 (1979); *Estate of Lillakai* v. *Commissioner*, 628 F.2d 65 (8th Cir. 1981); *Ferrando* v. *United States*, 245 F.2d 582 (9th Cir. 1957)).

Judge Posner dissented (Pet. App. 12a-16a). He emphasized that respondent "knew he had to file an estate tax return [and] must have known that the return was due within a fixed period of time after the decedent's death" (*id.* at 13a). Under these circumstances, Judge Posner stated, "ordinary business care and prudence" required that a fiduciary with respondent's business experience at least ascertain what the filing deadline was (*id.* at 15a). If respondent were to pay the penalty, Judge Posner noted, he would almost certainly have a claim for reimbursement against his lawyer, "whose admitted negligence was the primary cause of the late filing" (*id.* at 16a). But instead of creating incentives for timely filing by shifting liability to the person who was at fault, the majority in Judge Posner's view improperly "adopt[ed] an approach that rewards both the active negligence of the lawyer and the passive negligence of his client" (*ibid.*).

The government's petition for rehearing was denied (Pet. App. 19a-20a), with Judges Posner and Cudahy voting for rehearing en banc.

SUMMARY OF ARGUMENT

Section 6651(a)(1) imposes a civil penalty, technically an "addition to the tax," in order to protect the revenue. A taxpayer who files a return late can avoid the penalty only if he demonstrates two things. First, he must show that his failure to file on time is "not due to willful neglect." Second, he must show that his failure to file on time "is due to reasonable cause."

If a taxpayer proves that he lacked business experience and acted in good faith, he will generally be able to satisfy the first prong of this test, *i.e.*, to show that he did not act "willfully" in neglecting to file on time. But the taxpayer's subjective state of mind and individual business expertise are irrelevant in answering the question presented here—whether his failure to file on time "is due to reasonable cause" within the meaning of Section 6651(a)(1). The regulations, whose validity is not challenged, set forth an objective, "reasonable man" test for this purpose. Under the regulations, a late filing is due to reasonable cause "[i]f the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time" (Treas. Reg. § 301.6651-1(c)(1)).

An executor is a fiduciary charged with certain duties, among which is the duty to file tax returns on the estate's behalf. Section 6018(a) provides that "the executor shall make a return with respect to the estate tax," and Section 6075(a) provides that the estate tax return "shall be filed within 9 months after the date of the decedent's death." In discharging these duties—as in discharging all his other fiduciary duties—the executor is required "to manifest the care, skill, prudence, and diligence of an ordinarily prudent man engaged in similar business affairs." G. Bogert, *The Law of Trusts & Trustees* § 541, at 157 (2d ed. 1979).

The vast majority of courts that have considered the question have interpreted those provisions, correctly, to impose on executors a personal, nondelegable duty to file estate tax returns on time. Because this duty is personal and nondelegable, an executor cannot discharge it merely by entrusting the return's preparation to an agent. In order to show "ordinary business care and prudence," the executor must per-

sonally ascertain the due date of the return, and take steps to ensure that his agent prepares the return in time to file it when due.

The court of appeals thus erred as a matter of law in holding that reliance on counsel, without more, constitutes "reasonable cause" for filing a return late. Respondent failed to ascertain the deadline for filing the return, and failed to exercise the requisite care to ensure that his lawyer prepared it on time. His negligence in these respects contributed to the return's delinquency and was incompatible with the exercise of "ordinary business care and prudence." What is more, the negligence of his agent must be attributed to him as principal, and thus cannot constitute "reasonable cause" for the late filing either.

The court of appeals, in reaching a contrary result, reasoned by analogy to cases upholding the "reliance on counsel" defense where a taxpayer seeks an attorney's substantive legal advice. Those cases have no application here. It is of course well established that a taxpayer has "reasonable cause" for a late filing if he consults a competent attorney, is informed (for example) that a personal holding company return need not be filed, and relies in good faith on that advice. Respondent, however, did not seek, nor did he rely on, Keyser's substantive legal advice. There was no question here that a return had to be filed; the only question was *when* it had to be filed, and Keyser said nothing about that to respondent one way or the other. Ascertaining a return's due date is not a complex task, and it is a task that all taxpayers, including fiduciaries like respondent, have a personal and nondelegable duty to perform. Assistance is available from the IRS by telephone for this purpose.

In sustaining a "reliance on counsel" defense in these circumstances, the court of appeals' decision contravenes strong considerations of tax policy and common sense. By according dispositive weight to a taxpayer's unawareness of filing deadlines, it threatens our self-assessment system of taxation by encouraging ignorance of the law. And by permitting a taxpayer to escape the penalty by citing his agent's negligence, it prevents the IRS from collecting any penalty at all, even though a return has indisputably been filed late in violation of the Code. The right answer is to let the IRS collect its penalty, leaving the taxpayer free to seek reimbursement from his lawyer on grounds of malpractice or breach of fiduciary duty. "In this way," Judge Posner noted below, "proper incentives would be created to avoid a persistent problem in the enforcement of the tax laws" by having liability "come to rest on the person whose fault was primarily responsible" (Pet. App. 16a (Posner, J., dissenting)).

ARGUMENT

Where A Tax Return Is In Fact Negligently Filed Late, The Taxpayer's Reliance Upon An Attorney To Prepare The Return For Him Does Not Constitute "Reasonable Cause" Sufficient To Defeat The Late-Filing Penalty Imposed By Section 6651(a)(1)

Section 6651(a)(1) provides that "[i]n case of failure to file any return * * * on the date prescribed therefor * * *, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax" for each month the return is delinquent, up to a maximum of 25% in the aggregate. The penalty covers the late filing of any tax return (including returns of income, gift, and estate tax) other than certain information returns. The

penalty is applicable "unless it is shown that [the] failure [to file on time] is due to reasonable cause and not due to willful neglect" (*ibid.*). The burden of proof is on the taxpayer to demonstrate both the *absence* of willful neglect and the *presence* of reasonable cause. *Rubber Research, Inc.* v. *Commissioner*, 422 F.2d 1402, 1407 (8th Cir. 1970) (Blackmun, J.); *Logan Lumber Co.* v. *Commissioner*, 365 F.2d 846, 853 (5th Cir. 1966); *Ferrando* v. *United States*, 245 F.2d 582, 587, 589 (9th Cir. 1957); *Estate of Mayer* v. *Commissioner*, 43 T.C. 403, 405 n.1 (1964), aff'd per curiam, 351 F.2d 617 (2d Cir. 1965), cert. denied, 383 U.S. 935 (1966). If the taxpayer fails to demonstrate "reasonable cause," imposition of the penalty is mandatory.[4]

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[4] The language of Section 6651(a)(1) is derived, without substantial alteration, from Section 291 of the Internal Revenue Code of 1939, ch. 2, § 291, 53 Stat. 88 (imposing addition to the tax for failure to file a return on time "unless it is shown that such failure is due to reasonable cause and not due to willful neglect"). Prior to the Revenue Act of 1936, ch. 690, 49 Stat. 1727, Section 291 imposed an addition to the tax for failure to file a return on time unless "a return [was] filed after such time and it [was] shown that the failure to file it was due to reasonable cause and not due to willful neglect." *E.g.*, Revenue Act of 1934, ch. 277, § 291, 48 Stat. 746; Revenue Act of 1932, ch. 209, § 291, 47 Stat. 238; Revenue Act of 1928, ch. 852, § 291, 45 Stat. 857. The effect of this earlier provision was to make imposition of the penalty mandatory where no return was ever filed, and to make the "reasonable cause" defense available only where a return was filed late. *See Commissioner* v. *Lane-Wells Co.*, 321 U.S. 219, 224-225 & n.11 (1944). We have found no legislative history discussing any of these provisions. Prior to the Revenue Act of 1928, the penalty for late filing of tax returns was contained in Section 3176 of the Revised Statutes. As originally codified, that Section imposed a 50% addition to the tax "in case of a refusal or neglect * * * to make a list or return," and made

The regulations provide that a late filing is due to reasonable cause if "the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time." Treas. Reg. § 301.6651-1(c)(1). This definition tracks the standard judicial definition of "reasonable cause" in tax cases (see, *e.g.*, *Southeastern Finance Co.* v. *Commissioner*, 153 F.2d 205 (5th Cir. 1946)), and the validity of the regulation is not challenged here. Although the existence of reasonable cause is a question of fact, the elements that must be present to constitute reasonable cause involve questions of law. *E.g.*, *Haywood Lumber & Mining Co.* v. *Commissioner*, 178 F.2d 769, 771-772 (2d Cir. 1950); *Orient Inv. & Fin. Co.* v. *Commissioner*, 166 F.2d 601, 604 (D.C. Cir. 1948). "[T]he test," as Judge Posner noted in dissent below (Pet. App. 12a), "is ordinary negligence."[8]

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imposition of the penalty mandatory "except in cases of sickness or absence." Rev. Stat. § 3176 (1878 ed.). In 1916, the "sickness or absence" language was eliminated, and Section 3176 was amended to read much as the initial version of Section 291 did. Revenue Act of 1916, ch. 463, § 16, 39 Stat. 775 (imposing 50% addition to the tax for failure to file a return on time "except that, when a return is voluntarily and without notice from the collector filed after such time and it is shown that the failure to file it was due to a reasonable cause and not to willful neglect, no such addition shall be made to the tax"). The language of subsequent versions of Section 3176 was substantially identical. Revenue Act of 1918, ch. 18, § 1317, 40 Stat. 1148; Revenue Act of 1921, ch. 136, § 1311, 42 Stat. 313. The committee reports on the 1916 Act do not discuss the reasons for the change.

[8] The Internal Revenue Service has enunciated eight specific reasons for late filing of a return which, if established by the taxpayer to the satisfaction of the district director, will automatically be accepted as "reasonable cause." See [2 Audit]

In the present case, it is obvious that, if respondent had undertaken to prepare the estate tax return himself, and if the facts were otherwise similar, the estate could not escape the late-filing penalty. Respondent knew that an estate tax return was required to be filed (J.A. 23-24, 40, 48, 52). He also knew that it had to be filed by some specific date (*id.* at 15-16, 18-19, 48, 52). Under these circumstances, "ordinary business care and prudence" would plainly have required him to find out what that date was, and see to it that the return was filed in timely fashion. It is well established that ignorance of a return's due date, standing alone, does not amount to "reasonable cause." *E.g.*, *Estate of DiRezza* v. *Commissioner*, 78 T.C. 19, 33 (1982) (citing cases). Mere inadvertence is not enough either. *E.g.*, *Plunkett* v. *Commissioner*, 118 F.2d 644, 650 (1st Cir. 1941) (citing cases). In short, if respondent had not entrusted preparation of the return to an agent, the Commissioner would unquestionably be entitled to collect the late-filing penalty.

It is also obvious that the estate tax return involved here was, in fact, filed late because of negligence. Keyser's excuses for his dereliction boiled down to pleas of oversight and overwork (see J.A. 16,

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Internal Revenue Manual (CCH) § 4350, ¶ (24)22:2 (Audit Technique Handbook), at 7633-79 *et seq.* (Mar. 20, 1980). These causes include unavoidable postal delays, the death or serious illness of the taxpayer or a member of his family, the taxpayer's reliance upon the erroneous advice of an IRS employee, the taxpayer's unavoidable absence, the Service's failure to furnish the taxpayer with the necessary forms in timely fashion, the destruction by casualty of the taxpayer's records or place of business, and the taxpayer's timely filing of his return with the wrong IRS office.

46, 52). It is well established that such excuses are inconsistent with the exercise of "ordinary business care and prudence." *See, e.g.*, 10 Mertens, *Law of Federal Income Taxation* § 55.23, at 154 (J. Doheny ed. 1981). Indeed, the court below stated that Keyser's behavior was negligent. See Pet. App. 9a, 10a, 11a (Coffee, J., concurring); *id.* at 16a (Posner, J., dissenting). In short, if respondent himself had done what Keyser did, the Commissioner again would clearly be entitled to collect the late-filing penalty.

The narrow question presented here, therefore, is whether the result should be any different solely because respondent chose to have the estate tax return prepared by somebody else. Stated somewhat more technically, the question is whether a taxpayer's reliance on an agent to prepare a tax return for him, standing alone, constitutes "reasonable cause" for filing the return late, where the taxpayer fails to ascertain the due date of the return, and where the return is in fact filed late because of negligence. The Code and regulations, the weight of judicial authority, strong considerations of tax policy, and common sense alike dictate a negative answer to this question.

A. When it is clear that a tax return must be filed, the taxpayer has a personal and nondelegable duty to file it on time, and reliance on a third party to do so cannot as a matter of law constitute "reasonable cause" for a late filing

1. Section 6011(a) generally provides that "any person made liable for any tax * * * shall make a return." Section 6061 provides that "any return * * * shall be signed" by the person required to make it. I.R.C. § 6061; Treas. Reg. §§ 1.6061-1(a) (income tax returns), 25.6061-1 (gift tax returns),

31.6061-1 (employment tax returns). Section 6065 and its implementing regulations provide that, if a return is required to be verified under penalties of perjury, the return "shall be so verified by the person signing it." I.R.C. § 6065; Treas. Reg. §§ 1.6065-1(a) (income tax returns), 25.6065-1 (gift tax returns), 31.6065(a)-1 (employment tax returns). The regulations permit a return to be executed by an agent on behalf of the taxpayer in certain circumstances. Treas. Reg. §§ 1.6061-1(a) and 1.6012-1(a)(5) (income tax returns), 31.6061-1 and 31.6011(a)-7(a) (employment tax returns).* "Whenever a return is made by an agent it must be accompanied by a power of attorney * * * authorizing [the agent] to represent his principal in making, executing, or filing the return." Treas. Reg. §§ 1.6012-1(a)(5) (income tax returns), 31.6011(a)-7(a) (employment tax returns). The Code and regulations specify the time for filing tax returns, providing in each instance that the return "shall be filed" by the specified date. I.R.C. §§ 6071-6076; Treas. Reg. § 1.6071-1.

These rules generally apply with equal force to executors of estates. An executor is a fiduciary charged

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* In the case of income tax returns, a return may be executed by an agent if the taxpayer is unable to make a return "by reason of disease or injury" or "by reason of continuous absence from the United States" for a specified period, or if the taxpayer requests written permission from the district director and the latter "determines that good cause exists for permitting the return to be so made." Treas. Reg. § 1.6012-1(a)(5). The regulations do not explicitly provide for execution of returns by agents in the case of estate and gift tax returns. See Treas. Reg. §§ 20.6061-1 (estate tax), 25.6061-1 (gift tax).

with certain duties, one of which is the duty to file tax returns on the estate's behalf. Section 6018(a)(1) provides that "the executor shall make a return with respect to the estate tax." The regulations provide that the estate tax return "shall be signed by the executor" and "must be * * * verified" by him under penalties of perjury. Treas. Reg. §§ 20.6061-1, 20.6065-1(a). Section 6075(a) provides that estate tax returns "shall be filed within 9 months after the date of the decedent's death." The regulations emphasize that "[t]he estate tax return * * * must be filed on or before the due date" (Treas. Reg. § 20.6075-1), and warn that the executor "may incur liability for * * * penalties" if the return is filed late (Treas. Reg. §§ 20.6061-1, 20.6075-1).[7] The executor is also required to file a final income tax return on behalf of the decedent (I.R.C. § 6012(b)(1)) and annual income tax returns on behalf of the estate (I.R.C. § 6012(b)(4)), to sign (Treas. Reg. § 1.6061-1(a)) and verify (Treas. Reg. § 1.6065-1(a)) those returns, and to do so in timely fashion (I.R.C. § 6072; Treas. Reg. § 1.6072-1(a) and (b)).

2. The vast majority of courts that have considered the question have correctly interpreted these Code and regulatory provisions to impose on taxpayers (including executors) a personal, nondelegable duty to file tax returns on time. This interpretation has been explicitly adopted by the Fifth,[8] Eighth[9] and Ninth Circuits,[10] by the Tax Court,[11] and by numerous district courts.[12] See Note, *Late*

[7] Section 6081(a) provides that the Commissioner "may grant a reasonable extension of time," generally not to exceed six months, "for filing any return." The regulations provide that an extension of time to file an estate tax return may be granted, upon specified conditions, "[i]n case it is impossible or impracticable for the executor to file a reasonably complete return" within the prescribed time. Treas. Reg. § 20.6081-1(a). Neither respondent nor his attorney requested an extension of time to file the estate tax return involved here.

[8] *See Millette & Associates, Inc.* v. *Commissioner*, 594 F.2d 121, 124-125, *cert. denied*, 444 U.S. 899 (1979) ("[T]he responsibility for assuring a timely filing is the taxpayer's."); *Logo. Lumber Co.* v. *Commissioner*, 365 F.2d 846, 854 (1966) ("The federal tax statute has 'placed the responsibility for filing [of a] return on time squarely upon each and every taxpayer.'") (quoting *Rice* v. *Commissioner*, 14 T.C. 508, 509 (1950)).

[9] *See Bowing* v. *United States*, 650 F.2d 493, 495 (1981) ("The executor or executrix has a personal and nondelegable duty to file a timely return."). Accord, *Estate of Korber* v. *United States*, 717 F.2d 454, 455 (1983), petition for cert. pending, No. 83-1058; *Crouse* v. *United States*, 711 F.2d 102, 104 (1983); *Smith* v. *United States*, 702 F.2d 741, 743 (1983).

[10] *See Ferrando* v. *United States*, 245 F.2d 582, 586, 589 (1957) ("'The filing of a tax return when due is a personal, nondelegable duty of the taxpayer; as a general proposition, it is no valid excuse for him to say that the matter was put in charge of an employee or accountant or attorney, no matter how trustworthy that person may be.'") (quoting Annot., 3 A.L.R.2d 619 (1948)).

[11] See, *e.g.*, *Estate of Lillick* v. *Commissioner*, 39 T.C.M. (CCH) 518, 520 (1979), *aff'd per curiam*, 658 F.2d 65 (9th Cir. 1981) ("An executor who is aware of the necessity of filing an estate tax return has a personal nondelegable duty to timely file that return."); *Estate of Goff* v. *Commissioner*, 37 T.C.M. (CCH) 199, 201 (1978) (same) (citing cases).

[12] See, *e.g.*, *Bowvicini* v. *United States*, 83-1 U.S.T.C. (CCH) ¶ 13,528 (D. Colo. 1983); *Estate of Campbell* v. *United States*, 449 F. Supp. 675, 680 (D.N.J. 1977) ("[T]he duty to file a return when due is personal and nondelegable in cases where there is no question that a return must be filed."); *Daley* v. *United States*, 480 F. Supp. 808, 811 (D.N.D. 1979) ("[T]he

Filing of Federal Estate Tax Returns: Reliance on Attorney as Reasonable Cause, 32 Drake L. Rev. 157, 176 (1982-1983) (collecting cases); *Note, Reasonable Cause for the Late Filing of Estate Tax Returns*, 11 Ind. L. Rev. 621, 644 (1978) (collecting cases). The Seventh Circuit itself has held that, "when there is no question that a return must be filed, the taxpayer has a personal, nondelegable duty to file the tax return when due." *United States* v. *Kroll*, 547 F.2d 393, 396 (1977). Accord, *Fleming* v. *United States*, 648 F.2d 1122, 1125, 1126 (7th Cir. 1981). Contra, *Rohrabaugh* v. *United States*, 611 F.2d 211 (7th Cir. 1979). And while this Court has not addressed the question directly, it has observed that Congress "has made it the duty of the taxpayer" to comply with the Code's provisions respecting the filing of tax returns. *Commissioner* v. *Lane-Wells Co.*, 321 U.S. 219, 223 (1944)."

Two conclusions necessarily follow from this premise. First, because the taxpayer's obligation to file on time is personal, he has a concomitant duty personally to ascertain what the filing date is. "Any layman with

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duty to file the tax return is personal and may not be delegated."); *Richter* v. *United States*, 440 F. Supp. 921, 924 (D. Minn. 1977) ("[A]n executor has a nondelegable duty to file the tax return for the estate.").

[*] As suggested by the Seventh Circuit in *Kroll* and by other courts that have considered the issue (see pages 17-18 notes 11-12, *supra*), a *different* conclusion may be warranted where there *is* a question as to whether a return must be filed, *e.g.*, where the obligation to file a return hinges on resolution of complicated legal questions about which a lawyer's advice is sought. See pages 23-26, *infra*. In the present case, there was no doubt that an estate tax return had to be filed (J.A. 23-24, 40, 48, 52), and respondent was aware of this fact (*ibid.*).

the barest modicum of business experience knows that there is a deadline for the filing of returns" (*Kroll*, 547 F.2d at 396), and taxpayers (including executors) are presumed to know that tax returns have due dates. See, *e.g.*, *Ferrando*, 245 F.2d at 586; *Estate of Rapelje* v. *Commissioner*, 73 T.C. 82, 89 n.7 (1979); *Estate of Lillehei*, 39 T.C.M. (CCH) at 520. In the exercise of "ordinary business care and prudence" (Treas. Reg. § 301.6651-1(c)(1)), therefore, the taxpayer must inform himself of the filing deadline, since he otherwise will obviously be unable to ensure that his timely-filing obligation is met.

Second, because the taxpayer's duty to file on time is nondelegable, he entrusts that task to someone else at his peril. Although a taxpayer may retain a lawyer, accountant, or other agent to prepare his return, he may not delegate away his obligation to file the return on time. Thus, if a taxpayer elects to employ an agent, it is the taxpayer's duty to "take appropriate steps to see to it that the delegate acts with diligence in fulfilling the filing obligation." *Estate of Rapelje*, 73 T.C. at 89-90.[*] If the taxpayer fails to oversee his agent's activities, with the result that the return is filed late, the taxpayer's failure of oversight contributes to the return's delinquency and is

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[*] Accord, *e.g.*, *Estate of Lillehei*, 630 F.2d at 66; *Millette & Associates, Inc.*, 594 F.2d at 134-135; *Estate of Lammerts* v. *Commissioner*, 456 F.2d 681, 683 (2d Cir. 1972) (*per curiam*); *Ferrando*, 245 F.2d at 586-587; *Daley*, 490 F. Supp. at 812; *Pfeiffer* v. *United States*, 315 F. Supp. 392, 396 (E.D. Cal. 1970); *Estate of DiRenzo*, 79 T.C. at 33; *Estate of Dottenheifer* v. *Commissioner*, 49 T.C. 200, 205 (1967), *aff'd per curiam*, 410 F.2d 502 (6th Cir. 1969); *Estate of Gerosi* v. *Commissioner*, 32 T.C.M. (CCH) 634, 635 (1973), *aff'd per curiam*, 502 F.2d 1143 (6th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975).

incompatible with the exercise of "ordinary business care and prudence." If the agent acts negligently as well, his negligence, under hornbook agency law, is imputed to the taxpayer as principal, and thus cannot constitute "reasonable cause" for the return's late filing. See, *e.g.*, *Fleming*, 648 F.2d at 1127 (citing Restatement (Second) of Agency §§ 9(3), 10, 272, 277 (1958)); *Rohrabaugh*, 611 F.2d at 220 (Swygert, J., dissenting); *Dritz* v. *Commissioner*, 28 T.C.M. (CCH) 874, 882 (1969), aff'd per curiam, 427 F.2d 1176 (5th Cir. 1970). See also 2 A. Scott, *The Law of Trusts* § 171.1 (3d ed. 1967); 3 *id.* § 225.1; Restatement (Second) of Agency § 214 (1958).[10]

3. Because an executor has a personal and non-delegable duty to file tax returns on time, the courts with near unanimity have held that his "reliance on an attorney to timely file the estate tax return, without more, is not enough to establish the exercise of ordinary business care and prudence." *Estate of Lillehei*, 39 T.C.M. (CCH) at 520. Accord, *e.g.*,

[10] It is generally true that the doctrine of agency would not operate to impute a lawyer's negligence to his client where the client seeks substantive legal advice and relies in good faith on advice erroneously given. See, *e.g.*, *Hapgood Lumber & Mining Co.* v. *Commissioner*, 178 F.2d 703, 771 (2d Cir. 1950) ("To impute to the taxpayer the mistakes of his consultant would be to penalize him for consulting an expert; for if he must take the benefit of his counsel's or accountant's advice *cum onere*, then he must be held to a standard of care which is not his own and one which, in most cases, would be far higher than that exacted of a layman."). But application of agency principles is completely appropriate where (as here) the taxpayer does not seek substantive legal advice, but relies on his lawyer merely to discharge the taxpayer's personal and non-delegable duty to file a tax return on time. See pages 25-26, *infra*.

Boering, 630 F.2d at 495; *Fleming*, 648 F.2d at 1125; *Millette & Associates, Inc.*, 594 F.2d at 125; *Estate of Dattenhofer* v. *Commissioner*, 410 F.2d 202 (6th Cir. 1969), aff'g per curiam 49 T.C. 200, 204-205 (1967); *Ferrando*, 245 F.2d at 589; *Daley*, 450 F. Supp. at 811; *Estate of Rapelje*, 73 T.C. at 89. In order to demonstrate "ordinary business care and prudence," the executor must do more than simply hand things over to an attorney. He must personally acquaint himself with the deadline for filing the return, and he must take whatever steps are necessary to ensure that the attorney files the return on or before that date.

Application of these principles to the instant facts shows that the court of appeals erred as a matter of law in sustaining respondent's "reliance on counsel" defense. Respondent knew that an estate tax return had to be filed and knew that it had to be filed by a certain date (J.A. 15-16, 18-19, 23-24, 40, 48, 52). He nevertheless failed to ascertain what the filing deadline was. Although he appears to have made desultory inquiries of Keyser (see J.A. 18, 48-49), he failed to exercise the care that an ordinarily careful and prudent businessman would exercise in ensuring that his tax return was timely prepared. And even if respondent's own behavior did not thus amount to "passive negligence" (Pet. App. 16a (Power, J., dissenting)), the active negligence of his agent must be imputed to him as principal, and thus cannot constitute "reasonable cause" for his failure to file on time.

B. There is no merit to the justifications advanced by the court of appeals to support its result

The Seventh Circuit's decisions in this case and *Rohrabaugh* are the only recent appellate authorities that have sustained a "reliance on counsel" defense

in the situation involved here." The court adduced three principal justifications to support its result. First, it reasoned by analogy to the "reliance on counsel" defense that is available when a client receives substantive tax advice from a lawyer. Second, it reasoned that an individual should be entitled to the defense where he lacks business expertise, particularly where he is unaware of the deadline for filing tax returns. Third, it suggested that the defense is appropriate where the return is an estate tax return, a document more remote from a layman's common experience. There is no merit to any of these theories.

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[10] As we have noted (pages 17-18, *supra*), that defense has repeatedly been rejected as a matter of law by the Fifth, Eighth and Ninth Circuits, and by other panels of the Seventh Circuit. Although the Sixth Circuit at one time countenanced the defense (see *In re Field's Estate*, 208 F.2d 358 (1953)), that case, involving a return mailed on the due date and received one day late, has largely been confined to its facts, as the Sixth Circuit has rejected the defense in more recent cases. See *Estate of Cornet*, 502 F.2d at 1149; *Estate of Buttondexter*, 419 F.2d at 502. The Second Circuit has consistently rejected the defense where (as here) the taxpayer does not rely on his lawyer for substantive legal advice. See *Estate of Lammerts*, 456 F.2d at 685, distinguishing *Hogwood Lumber*, 178 F.2d at 771; *Estate of Meyer* v. *Commissioner*, 381 F.2d 427 (1966), cert. denied, 393 U.S. 933 (1968). Although the defense has been sustained by several district courts, most of those decisions were either reversed on appeal (e.g., *Boering* v. *United States*, 498 F. Supp. 665, 671 (E.D. Mo. 1980), rev'd, 650 F.2d 893 (8th Cir. 1981)), were rendered before the court of appeals had spoken definitively to the contrary (e.g., *Greg* v. *United States*, 453 F. Supp. 1336 (W.D. Mo. 1978)), or were appealable to the Seventh Circuit (e.g., *Gimon* v. *United States*, 369 F. Supp. 33, 35-36 (W.D. Wis. 1973); *Estate of Zaccaby* v. *Commissioner*, 42 T.C.M. (CCH) 1300, 1302-1303 (1981)).

1. It is of course well established that reliance on counsel may constitute a defense to various penalties—including the negligence penalty (I.R.C. § 6653 (a)) and the miscellaneous penalties for failure to file returns or pay taxes (I.R.C. §§ 6651, 6652, 6671-6693)—where the taxpayer seeks and relies on a lawyer's substantive legal advice. To be entitled to the defense, the taxpayer must show that he consulted a competent lawyer or other tax advisor; that he made full disclosure of all relevant facts; that the advisor affirmatively opined on the precise question at issue; and that the taxpayer actually relied, in good faith, on the advice thus given." If these conditions are met, it is usually irrelevant that the lawyer's advice turns out to have been wrong.

These general principles apply no less to cases involving the late-filing penalty under Section 6651(a)(1). The courts have sustained a "reliance on counsel" defense to that penalty where a lawyer affirmatively advised that no return was required to be filed.[10] They have sustained the defense where a law-

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[9] Compare, *e.g.*, *Dayton Bronze Bearing Co.* v. *Gilligan*, 281 F. 709, 712-713 (6th Cir. 1922) (sustaining defense), and *Conlorez Corp.* v. *Commissioner*, 51 T.C. 467, 475 (1968) (same), with *Hanson* v. *Commissioner*, 696 F.2d 1232, 1234 (9th Cir. 1982) (per curiam) (rejecting defense), *Rubber Research, Inc.* v. *Commissioner*, 422 F.2d 1402, 1407 (8th Cir. 1970) (Blackmun, J.) (same), *Yale Avenue Corp.* v. *Commissioner*, 58 T.C. 1062, 1076-1077 (1972) (same), and *Van Dyke* v. *Commissioner*, 45 T.C.M. (CCH) 1233, 1236-1237 (1983) (same).

[10] *E.g.*, *Commissioner* v. *American Ass'n of Engineers Employment, Inc.*, 204 F.2d 19, 20 (7th Cir. 1953) (lawyer advised that no income tax return was required because organization was tax-exempt); *Estate of Christ* v. *Commissioner*, 54 T.C. 493, 553-554 (1970), aff'd on other grounds, 480 F.2d

yer gave advice, a necessary inference from which was that no return need be filed." And they have sustained the defense where the necessity of filing a return hinged on answers to complicated legal questions, the taxpayer consigned those questions to his tax advisor with instructions to prepare whatever returns were necessary, and the advisor indicated (explicity or implicity) that no return was called for." The rationale of these cases is that, "if a taxpayer has used reasonable care to ascertain whether

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171 (9th Cir. 1973) (lawyer advised that no estate tax return was required because gross estate was less than specific exemption); *Estate of Collino* v. *Commissioner*, 25 T.C. 1026, 1036 (1956) (same).

[14] *E.g.*, *Nelson* v. *Commissioner*, 19 T.C. 575, 581 (1952) (lawyer advised that corporate distribution was non-taxable return of capital).

[15] *E.g.*, *Haywood Lumber & Mining Co.* v. *Commissioner*, 178 F.2d 769, 771 (2d Cir. 1950); *Orient Ins. & Fin. Co.* v. *Commissioner*, 166 F.2d 601, 603 (D.C. Cir. 1948); *Hatfried, Inc.* v. *Commissioner*, 162 F.2d 628, 632 (3d Cir. 1947); *West Coast Ice Co.* v. *Commissioner*, 49 T.C. 345, 351-352 (1968); *Safety Tube Corp.* v. *Commissioner*, 8 T.C. 757, 766-767 (1947), aff'd, 168 F.2d 787 (6th Cir. 1948). These cases all involved penalties for the late filing of personal holding company returns. A corporation is required to file such returns only if it meets the definition of a "personal holding company" (I.R.C. § 541), a status that depends on answers to complex questions about the nature of its income (I.R.C. § 543) and the ownership (constructive or direct) of its stock (I.R.C. § 544). The IRS has ruled that the late-filing penalty "should not be asserted against a personal holding company in any case in which failure to file a timely [personal holding company tax return] is attributable to reliance in good faith upon the advice of a reputable accountant or attorney, experienced in Federal tax matters, and to whom all relevant information has been furnished." Rev. Rul. 172, 1953-2 C.B. 226.

a return is required to be filed and has been advised by a qualified professional that a return need not be filed, he has done all that can be expected of him and • • • can rely on the advice so given" (*Fleming*, 648 F.2d at 1125 (footnote omitted)).

The Seventh Circuit erred, both in this case (Pet. App. 4a) and in *Rohrabaugh* (611 F.2d at 214-215), in citing these cases to support its result. Respondent did not seek, nor did he rely on, Keyser's substantive legal advice. It was clear to all concerned that an estate tax return had to be filed; "[t]he only question • • • was 'when' the return was due, and not 'whether' one was due" (*Estate of Duttenhofer*, 49 T.C. at 205). Respondent was not given erroneous advice concerning the filing date and, in any event, the question when an estate tax return is due does not "involv[e] a complicated area of tax law" (*Estate of DiRezza*, 78 T.C. at 35-36). Discovery of the filing deadline, obviously, was "not beyond the expertise of a lay person," and entailed no more than "a simple inquiry to an attorney or the IRS" (*Daley*, 480 F. Supp. at 813). Respondent's "only task with respect to filing was to read a calendar and to jot down • • • a single date" (*Kroll*, 547 F.2d at 395).

For these reasons, the lower courts with near unanimity have held that the "reliance on counsel" doctrine has no application where (as here) it is clear that a return is due, and the taxpayer simply neglects to ascertain what the due date is. See, *e.g.*, *Fleming*, 648 F.2d at 1125; *Kroll*, 547 F.2d at 395-396; *Estate of Lammerts*, 456 F.2d at 683; *Richter*, 440 F. Supp. at 923-924; *Estate of DiRezza*, 78 T.C. at 35-36; *Paula Construction Co.* v. *Commissioner*, 58 T.C. 1055, 1061 (1972), aff'd mem., 474 F.2d 1345 (5th Cir. 1973). Indeed, this conclusion follows inescapably from the principle (demonstrated above) that, "when

there is no question that a return must be filed, the taxpayer has a personal, nondelegable duty to file" it on time (*Krall*, 547 F.2d at 396). The court of appeals thus erred in upholding respondent's "reliance on counsel" defense in these circumstances."

2. The court of appeals also suggested, both here (Pet. App. 4a) and in *Rokrabaugh* (611 F.2d at 216), that reliance on counsel should be "reasonable cause" for filing a return late when the case involves "an inexperienced taxpayer with no knowledge of business affairs." The court emphasized in *Rokrabaugh* that the executor "had no business experience that would reveal to her that there is a deadline for the filing of estate tax returns" (611 F.2d at 216).

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[a] This Court need not here decide whether the "reliance on counsel" defense would be available to a taxpayer, notwithstanding his personal and nondelegable duty to file on time, who is erroneously informed by his lawyer as to the filing date. See Pet. App. 13a (Fonner, *J.*, dissenting) (suggesting that defense might be available in such circumstances); *Estate of Bradley* v. *Commissioner*, 33 T.C.M. (CCH) 70, 72 (1974), aff'd mem., 511 F.2d 527 (6th Cir. 1975) (sustaining defense in such circumstances). Nor need the Court here decide whether the defense would be available to a taxpayer, notwithstanding his personal and nondelegable duty to file on time, who is erroneously informed by his lawyer that filing should be deferred past the normal due date because of extenuating circumstances, such as pending litigation. See, *e.g.*, *Northwestern Nat'l Bank* v. *United States*, 30 A.F.T.R.2d (P-H) ¶ 147,676 (D.S.D. 1972) (sustaining defense where lawyer advised delay in filing estate tax return pending outcome of state-court will contest); *Estate of DiPalma* v. *Commissioner*, 71 T.C. 324, 327 & n.3 (1978) (same); *Estate of Crute* v. *Commissioner*, 33 T.C.M. (CCH) 1073, 1075 (1974) (same). Those questions are not presented here, because the attorney in this case knew the correct date for filing the return and did not say anything about it to respondent one way or the other (J.A. 15-16, 18-19, 24-25, 48, 52-53).

The court noted below that, whereas respondent "had more business experience than the [executor] in *Rokrabaugh*," his experience "did not encompass the preparation or filing of tax returns and therefore would not support any inference that he, in fact, knew the filing deadline" (Pet. App. 4a). Indeed, the court in both cases held that the executor's ignorance of the filing date was the key criterion, distinguishing on this ground its previous decisions that had rejected the "reliance on counsel" defense. See *Rokrabaugh*, 611 F.2d at 216 (distinguishing *Krall*, 547 F.2d at 395); Pet. App. 5a (distinguishing *Fleming*, 648 F.2d at 1126). Other courts that have upheld the defense have generally taken the same view. See, *e.g.*, *Boeving* v. *United States*, 493 F. Supp. 665, 671 (E.D. Mo. 1980), rev'd, 650 F.2d 493 (8th Cir. 1981); *Gray*, 453 F. Supp. at 1359-1360; *Giesen*, 369 F. Supp. at 35-36; *Staff* v. *United States*, 80-1 U.S.T.C. (CCH) ¶ 13,353 (W.D.N.Y. 1980).

It may well be that a taxpayer's lack of business experience, particularly his ignorance of filing deadlines, would suffice to show that he did not act willfully in neglecting to file on time. In order to defeat the late-filing penalty, however, the taxpayer must satisfy a two-pronged test. He must show not only that his failure is "not due to willful neglect," but also that his failure "is due to reasonable cause" (I.R.C. § 6651(a)(1); see page 11, *supra*). And in determining whether a delinquent filing "is due to reasonable cause," the taxpayer's individual experience is irrelevant. Both the regulations (the validity of which is not challenged here) and established fiduciary law set forth an objective, "reasonable man" test—whether the executor "exercised ordinary business care and prudence" (Treas. Reg. § 301.6651-1(c)(1)). The question, therefore, is not

whether respondent was *actually* unaware of the filing deadline, but whether an ordinarily careful and prudent businessman, knowing that a return had to be timely filed, would *have remained* unaware of the filing deadline. "One does not have to be a professional co-executor or a probate lawyer to know that taxes have to be paid when they are due" (*Ferrando*, 245 F.2d at 586).

In making ignorance of the law the test, the decision below contravenes weighty considerations of tax policy. "The most compelling reason for rejecting the argument that absence of actual knowledge constitutes reasonable cause is that such a principle would undermine the effectiveness of our tax laws because it would encourage a taxpayer to remain uninformed" (*Daley*, 480 F. Supp. at 813). Congress has "made it the duty of the taxpayer to comply" with the Code's filing requirements in order to "implement[] the system of self-assessment which is so largely the basis of our American scheme of income taxation." *Commissioner* v. *Lane-Wells Co.*, 321 U.S. 219, 223 (1944). The court below acknowledged that, if respondent had informed himself of the filing deadline, the "reliance on counsel" defense would be unavailable notwithstanding his reliance on Keyser (Pet. App. 4a-5a; accord, *Kirkpatrick*, 611 F.2d at 214). The court's reasoning thus has the anomalous result of permitting an executor to escape liability by failing to discharge what is a basic fiduciary responsibility of all executors and a basic civic responsibility of all taxpayers—ascertaining what their duties are and when those duties must be carried out.

In making ignorance of the law the test, moreover, the decision below would have a deleterious impact on the attorney-client relationship, since it would encourage lawyers deliberately to keep their clients in the

dark. That, indeed, may have been what happened here. Respondent testified that he repeatedly asked Keyser when the return was due, only to be repeatedly put off with assurances that he "would be notified in due course" (J.A. 19, 48-49). Still worse, the decision below might encourage collusion. Whether a client has actually been informed of a return's due date will typically be a fact known only to him and his lawyer. If his ignorance of that fact were to take on talismanic proportion, the regrettable result would be a temptation to convenient lapses of recollection, to "desperately self-serving declarations by negligent lawyers" (Pet. App. 15a (Posner, J., dissenting)), or to outright duplicity.

3. As a final justification for upholding a "reliance on counsel" defense, the Seventh Circuit suggested in *Kirkpatrick* that the outcome should reflect the "difference between an income tax and a federal estate return insofar as presumed knowledge is concerned" (611 F.2d at 218 n.2). "The situation might be *entirely different*," the court suggested, "if filing an income tax return were involved," since "[e]veryone, except fiscal year taxpayers, has the same income tax deadline" (*id.* at 214). Estate tax returns, by contrast, have "a floating due date keyed to the timing of the death of a particular decedent" (*ibid.*).

This reasoning is spurious. An executor is a fiduciary charged by law with certain duties. The position of executor "[is] not an honorary one;" it is generally assumed voluntarily; and it typically entitles its holder to "receive[] a commission for fulfilling the concomitant obligations." *Pfeiffer*, 315 F. Supp. at 396. *See Krull*, 547 F.2d at 396; *Daley*, 480 F. Supp. at 812. Among those obligations is the duty to file tax returns on behalf of the estate. This duty

was imposed on respondent both by federal law (see pages 15-16, *supra*) and by Illinois probate law, under which "the duties of * * * executors include[] the payment of claims against the estate, including all Federal estate taxes, prior to any distribution to legatees." *In re Estate of Marks*, 51 Ill. App. 3d 535, 539, 366 N.E.2d 1077, 1081 (1977). In discharging his duties, an executor is required (as any other fiduciary is required) "to manifest the care, skill, prudence, and diligence of an ordinarily prudent man engaged in similar business affairs." G. Bogert, *The Law of Trusts & Trustees* § 541, at 157 (2d ed. 1978). See W. Prosser, *Handbook of the Law of Torts* § 32, at 152-154 (4th ed. 1971).

Under these circumstances, it is not too much to ask that an executor "at least ascertain what [his] obligations [are]" (*Pfeiffer*, 315 F. Supp. at 396). To ascertain the filing date of an estate tax return, an executor need not delve into the Internal Revenue Code. He need make only "a simple inquiry to an attorney or the IRS" (*Daley*, 480 F. Supp. at 813). The IRS issues several publications, available free of charge, that explain executors' responsibilities in filing tax returns, and every telephone book lists an IRS number (generally toll-free) where taxpayers can obtain this sort of simple tax information. State courts have not hesitated to uphold surcharges against executors and their lawyers for losses occasioned by the late filing of tax returns,[22] and there is no reason

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[22] See, *e.g.*, *In re Lohm Estate*, 440 Pa. 268, 276-277, 269 A.2d 451, 455-456 (1970) (emphasis omitted):

> A prudent man may not have the technical knowledge or skill to prepare an estate tax return or even an income tax return, and so would properly rely on one more knowledgeable. But a prudent man in the conduct of his own affairs would certainly know that there is a time when a tax return must be made and a time when a tax is due and payable, and, if he did not know what those times were, he would find out. * * * We have difficulty in comprehending how, in this tax conscious age, an executor of an estate can with impunity be or remain ignorant of the time for filing tax returns or paying the taxes in the estate he is managing. The need to schedule the payment of bills, to plan for advance and final distributions, to do what is necessary to meet cash requirements by sales of assets or otherwise, to prepare for the time a final account can be filed and an estate can be wound up—indeed all the principal aspects of an executor's job—are related in a significant way to the time for the payment of taxes, be they state or federal or both, and to some approximation of the amounts thereof.

why a more lenient rule should prevail for federal tax purposes.

There is a more fundamental flaw, however, in the court of appeals' suggestion that the availability of a "reliance on counsel" defense should depend on the type of tax return involved. It is basic to our self-assessment system of taxation that each taxpayer must inform himself of his filing obligations. This principle applies regardless of the kind of tax for which a person happens to be liable, and regardless of whether the return happens to be due on April 15th. Taxpayers using a fiscal year have a "floating due date" (*Rohrabaugh*, 611 F.2d at 214) for their income tax returns (I.R.C. § 6072(a)). Individuals who employ maids or other domestic workers are required to file quarterly returns of social security tax (Treas. Reg. § 31.6011(a)-1(a)(1) and (3)). Corporations using the calendar year must file their income tax returns by March 15th (I.R.C. § 6072(b)). The courts have rejected "reliance on counsel" de-

fenses to the late-filing penalty in these other areas,[23] and there is no reason why there should be a special rule for executors. Congress certainly drew no such distinction in Section 6651(a)(1), but instead has treated all types of returns (other than certain information returns) alike in one comprehensive penalty provision (see page 10, *supra*). Unless there is some question about the obligation to file at all (see pages 23-26, *supra*), therefore, the type of return involved should make no difference in determining the application of the late-filing penalty.

C. The availability of a "reliance on counsel" defense in situations of this sort is inconsistent with equitable enforcement of the internal revenue laws

The view adopted by the majority of the courts of appeals, rejected by the Seventh Circuit below, is supported by sound considerations of tax policy. The government is entitled to receive its taxes when they are due. Congress enacted the "addition to the tax" for delinquent returns, not to punish taxpayers, but "'to protect the revenue.'" *Logan Lumber Co.*, 365 F.2d at 854 & n.18 (quoting *Plunkett* v. *Commissioner*, 118 F.2d 644, 650 (1st Cir. 1941)). If taxpayers can escape the adverse consequences of filing returns late by relying on their agents' negligence, the inevitable effect will be to "blunt[] the salutary objective of the penalty statute." *Rohrabaugh*, 611 F.2d at 220 (Swygert, J., dissenting).

The majority view is likewise supported by common sense. Because the late-filing penalty is an "addition to the tax," it can be collected only from the

[23] *E.g.*, *Logan Lumber Co.*, 365 F.2d at 854 (corporate income tax return); *Paula Construction Co.*, 58 T.C. at 1061 (small business corporation income tax return).

person liable for the tax, and not from his agent. If the taxpayer can defeat the penalty by citing his agent's negligence, therefore, the government will not be able to collect the penalty from anyone, even though a return has indisputably been filed late—and filed late negligently—in violation of the Code. But "[t]here is no reason for the Government to bear the burden of [a] late filing * * * created by the taxpayer's own failure to exercise reasonable care or by his attorney's neglect" (*Fleming*, 648 F.2d at 1127 (Swygert, J., concurring)).

The right answer is to let the IRS collect the penalty from the taxpayer, leaving the taxpayer free to seek reimbursement from his agent on grounds of malpractice or breach of fiduciary duty. See *Fleming*, 648 F.2d at 1127 (Swygert, J., concurring); *Rohrabaugh*, 611 F.2d at 220 (Swygert, J., dissenting); *Sarto* v. *United States*, 563 F. Supp. 476, 478 (N.D. Cal. 1983). Accord, Harris & Warner, *Estate Late Filing Penalty Under Section 6651: New Stricter Interpretations*, 57 Taxes 275, 280 (1979); Preston, *Reliance-On-Attorney Defense to Late-Filing Penalty Increasingly Being Rejected by Courts*, 9 Est. Plan. 280, 284 (1982). See Note, *supra*, 11 Ind. L. Rev. at 620-621. "In this way," Judge Posner noted below, "proper incentives would be created to avoid a persistent problem in the enforcement of the tax laws" by having liability "come to rest on the person whose fault was primarily responsible" (Pet. App. 16a). As among the IRS, the executor, and the attorney, the only party who one can say with assurance was *not* negligent in situations of this sort is the IRS. It would thus be an odd notion of equity to deprive the government of its penalty for a return negligently filed late, to let the passively-negligent executor have the use of the government's money, and to

let the actively-negligent lawyer escape completely unscathed. If the IRS cannot collect the penalty, of course, the lawyer's negligence "has not hurt and may have benefited his client," so that he need fear no malpractice action (Pet. App. 12a (Posner, J., dissenting)). But public policy considerations surely do not favor "immuniz[ing] a negligent attorney from what appears to be an open and shut malpractice suit" (*Rohrabaugh*, 611 F.2d at 220 (Swygert, J., dissenting)).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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RESPONDENT'S

BRIEF

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No. 83-1266

In The

Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT W. BOYLE, EXECUTOR OF THE ESTATE OF MYRA W. BOYLE, DECEASED, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether a taxpayer who reasonably relies on his counsel to prepare a federal estate tax return and who does not willfully neglect his duties as executor should automatically be penalized for a late filing under a statute, §6651(a)(1) of the Internal Revenue Code, which does not provide for an absolute penalty in all circumstances.

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BRIEF OF RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 710 F.2d 1251. The opinion of the district court (Pet. App. 21a-24a) is unofficially reported at 49 A.F.T.R.2d (P-H) ¶148,514.

JURISDICTION

The judgment of the court of appeals (Pet. App.17a-18a) was entered on June 24, 1983. A petition for rehearing was denied on October 11, 1983 (Pet. App. 19a-20a). On December 30, 1983, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including January 29, 1984, (a Sunday). The petition was filed on January 30, 1984, and was granted on March 26, 1984 (J.A. 55). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portion of Section 6651 of the Internal Revenue Code of 1954 (26 U.S.C.) is set forth in a statutory appendix (Pet. App. 25a-26a). The relevant portion of Treas. Reg. §301.6651(c)(1) is set forth in Appendix A to this brief.

STATEMENT

Because of a clerical error,[1] Robert W. Boyle, executor of his mother's estate, filed the federal estate tax return approximately three months late (Pet. App. 22a). The Internal Revenue Service now seeks a penalty of 20 per-

[1]Judge Campbell in his opinion noted that this was the apparent reason for the late filing (Pet. App. 3a).

cent of the tax due or $17,124.45, which computes to an effective interest rate of EIGHTY percent per annum for the period involved.[2] The Respondent does not object to the appropriateness or fairness of paying interest[3] because of the late filing but does object to the imposition of a penalty in such proportions as sought by the Internal Revenue Service.

The Respondent during the course of the administration of the estate did all that one could reasonably expect of a person not well informed on the nuances of tax law. He engaged a long-established law firm with over fifty years of experience in probate matters which had done work for his family since the 1930's (J.A. 19, 42), and he reasonably believed that the estate matters would be handled competently (J.A. 19, 42). There is no evidence in the record to suggest that such belief was unreasonable,[4] and the government has not suggested otherwise.

Mr. Boyle took an active interest in the administration of the estate, and there is no evidence to suggest he acted disinterested or "abandoned his duties." In fact, he supplied all necessary records (J.A. 38-39), made arrangements to sell a portion of the estate property and participated in same (J.A. 39), and otherwise remained in

[2]The tax return was due June 14, 1978, and filed on September 13, 1978. Hence, it was 91 days late. A penalty of $17,124.45 on a tax due of $85,622.26 for a 91-day period yields an interest rate of slightly over 80 percent per annum.

[3]The estate paid interest of $1,326.00 at the prevailing interest rate then in effect (Pet. 3, 4).

[4]Judge Campbell in the opinion for the Court noted: "He [referring to Boyle] hired competent counsel soon after his mother's death. . . ." (Pet. App. 4a).

contact with his attorney during the period in question (J.A. 19, 39, 48, 49).

Until the filing of its brief with this Court, the government has not suggested that the facts are in dispute (Pet. App. 2a). However, it now seeks to suggest otherwise in its brief (Pet. Brief, p. 3). A careful examination of Mr. Boyle's affidavits (J.A. 19, 47) and deposition (J.A. 31) shows that his statements are quite consistent and logical.

Mr. Boyle has a hearing deficiency and does not usually conduct business over the telephone (J.A. 43). Accordingly, his wife made most contact with the attorney's office by telephone (J.A. 44). The government refers to September of 1979 as some magical date and now apparently seeks to make the inference that this was the first time Mr. Boyle inquired about the return. In fact, the question asked of Mr. Boyle was, "Did you ever ask Mr. Keyser when the return was due?" (J.A. 41). The follow-up questions were in reference as to whether the specific deadline date was ever discussed (J.A. 41). The answer is quite simply that it was not until September of 1979 (J.A. 19, 41, 49). This is not inconsistent with the fact the Respondent's wife had made several general inquiries (J.A. 41, 48, 49) or that the Respondent himself had made inquiry as late as the spring of 1979 (J.A. 40).

The Seventh Circuit Court in its opinion specifically found the following: (1) that "Boyle had no experience in the field of federal estate taxation" (Pet. App. 2a); (2) that there was no evidence suggesting Mr. Boyle was uncooperative with his attorney (*id.* at 2a) or that he failed to timely provide records (*id.* at 2a); and (3) that he and

his wife had contacted Mr. Keyser *numerous* (emphasis added) times during the administration of the estate (*id.* at 3a). In short, there is simply not any controversy as to the facts of Mr. Boyle's behavior; and, therefore, the government seems compelled to focus much of its discussion on what Mr. Keyser did or did not do.

The simple fact is that Mr. Keyser must assume responsibility for a simple mistake—nothing more, nothing less—in actuality, as characterized by the Seventh Circuit, a clerical error (Pet. App. 3a). In fact, it was (and is) the only one of that nature he has made in over twenty years of practice (J.A. 51). There is absolutely no evidence to suggest or even infer that Mr. Keyser or Mr. Boyle willfully neglected the estate tax deadline.

The Seventh Circuit in affirming the District Court held under the facts of this case "reasonable cause" had been shown; and, therefore, the penalty was wrongfully imposed (Pet. App. 4a). In short, that Court concluded that Mr. Boyle had hired competent counsel, had maintained contact with the attorney, and had acted *promptly* (emphasis added) when the mistake was discovered (Pet. App. 4a-5a). The government in its brief quotes extensively from Judge Posner's dissent as an integral part of its request for a per se rule rejecting reliance on counsel as a defense to the imposition of a potentially devastating penalty. Although Judge Posner takes issue with the legal effect of the facts in this case, even he does not advocate the per se rule advocated by the government (Pet. App. 15a). He suggests the misinforming of the correct due date as a possible cause for late filing (Pet. App. 15a). Actually, he even goes further and says, "Let us by all

means, in the spirit of *Rohrabaugh, infra*, allow an exception for the completely inexperienced."[1] (Pet. App. 15a).

The reasoning of the Seventh Circuit is in conformity with the statute involved which permits a waiver of the late filing penalty if failure to file on time was "due to reasonable cause and not due to willful neglect" (language of Section 6651(a)(1)). The government's position in effect ignores the meaning of the words "willful neglect" and seeks to impose an absolute standard which Congress has not provided for. The continued existence of a narrow exception is warranted under the statute; and, if Congress intended an absolute penalty in all circumstances, the statute would have so provided. *Rohrabaugh v. United States*, 611 F.2d 211, 218 (7th Cir. 1979).

SUMMARY OF ARGUMENT

Section 6651(a)(1), which is a part of the statutory appendix (Pet. App. 25a-26a), contemplates and recognizes that there may be certain circumstances where the imposition of a penalty is not warranted. If Congress had a different desire, they could very simply make an absolute rule that any late filing would be subject to penalty. *Rohrabaugh v. United States*, 611 F.2d 211, 218 (7th Cir. 1979). Congress made this standard one which is of a

[1]The majority of the Court found the facts to indicate that Mr. Boyle was inexperienced, and there is nothing in the record to suggest or warrant the reversal of such finding.

different degree than the Internal Revenue Service as tax collector would prefer. The words "willful neglect" appear in the statute, which suggests that conduct beyond negligence is needed before a penalty is imposed. If the government's rationale is accepted, then the statute involved is in effect being rewritten to ignore the words "willful neglect."

Treas. Reg. § 301.6651-1(c)(1), which is set forth in part in Appendix A to this brief, seeks to render meaningless the words "willful neglect." The government in its brief takes great pains to point out that the regulation is not challenged (Pet. Brief 8, 12, 27). It is appropriate to challenge such regulation as it is not in conformity or harmony with the meaning of § 6651(a)(1). The regulation has—and for that matter many courts have—overlooked or ignored the qualifying words "willful neglect." The presence of such words indicates that Congress intended something beyond mere negligence or, in non-legal terms, a simple mistake or clerical error to justify the imposition of a penalty, which is a form of punishment.

There are absolutely no facts in the record to indicate that the taxpayer or his attorney acted with a conscious desire, design, or intention to fail to timely file the return. "Willful" has often been defined by courts in many contexts. "Willful" is a result of a conscious motion, voluntariness, and implies an act done intentionally as opposed to negligence which arises from heedlessness or non-voluntary action. *Black's Law Dictionary, Fifth Edition* (1979), p. 1434.

The standard which the government now seeks to impose clearly ignores the question of willful neglect. Al-

though it suggests there is a two-prong test, this is in fact an impossibility. How could a person who passed the "reasonable-man" test fail the willful-neglect test? The proper analysis is to require something beyond an inadvertent mistake or clerical error before a penalty and punishment are imposed.

The government suggests that equitable enforcement of the Internal Revenue laws is important and necessary. We agree wholeheartedly; however, we seriously question the fairness of the imposition of a penalty in a case like this or one like *Rohrabaugh v. United States*, 611 F.2d 211 (7th Cir. 1979). Under the government's position these taxpayers would be subject to the same type and amount of penalties as a taxpayer who filed late, did nothing during the administration of the estate, and even blatantly ignored the necessity to file after notice that a return was due. It would be an "odd notion of equity" if a taxpayer such as Boyle or the pathetic[4] receptionist/telephone operator in *Rohrabaugh* would be subject to the same penalty as those taxpayers who in fact can be fairly said to have willfully neglected their responsibilities.[5]

There is a clear distinction between the conduct of this taxpayer (and one like Mrs. Rohrabaugh) and those taxpayers in other cases where the reliance-on-counsel defense has been rejected. The continuance of a narrowly drawn exception is warranted, and such an exception cannot be said to give encouragement to file a return late. *Rohrabaugh v. United States*, 611 F.2d 211, 219 (7th Cir., 1979). To suggest that a taxpayer would have some reason or incentive to file a late return[6] and have to justify same by meeting a very narrowly drawn exception is without reason or logic, and the Seventh Circuit in its opinion so noted (Pet. App. 6a). If the taxpayer pays appropriate interest for late filing, the government has been fairly compensated for the loss of the use of money. However, when the government seeks a penalty—and one which we can only categorize as punishment—then under the statute requiring "willful neglect" the taxpayer should have done more than commit a simple, unintentional mistake or clerical error.

The reasons advanced by the Seventh Circuit for allowing a narrow exception are sound and logical. It may be easy in hindsight to suggest that Mr. Boyle should have asked a magical question or done something differently. Mr. Boyle acted responsibly and as any ordinary layman with limited experience in these matters would have. In addition to the criteria adopted by the Seventh Circuit (Pet. App. 4a), we suggest that it is reasonable to require an additional factor be present. That is, what did the taxpayer do when he realized his problem? Did he act promptly to rectify the situation or was he dilatory? The Seventh Circuit noted the importance of this as distinguished from the taxpayers in *United States v. Krall*, 547 F.2d 393 (7th Cir. 1977); and *Fleming v. United States*, 648 F.2d 1122 (7th Cir. 1981); (Pet. App. 5a). The pro-

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[4]As characterized by Judge Posner (Pet. App. 12a).

[5]See cases cited at pages 25 and 26 of this brief.

[6]Can anyone seriously argue that a person would be "encouraged" or have any "incentive" to become embroiled in a lawsuit where he is pitted against the full force and fury of the Internal Revenue Service and the United States Department of Justice?

case of this additional factor allows for a further limiting of the exception so that "Pandora's box" will remain closed and a flood of lawsuits will not occur (Seventh Circuit, per Judge Campbell; Pet. App. 6a).

The reasoning of the Seventh Circuit is in conformity with the statute involved which permits a waiver of the late filing penalty if failure to file on time was "due to reasonable cause and not due to willful neglect" (language of Section 6651(a)(1)). The government's position in effect ignores the meaning of the words "willful neglect" and seeks to impose an absolute standard which Congress has not provided for. The continued existence of a narrow exception is warranted under the statute; and, if Congress intended an absolute penalty in all circumstances, the statute would have so provided. *Rohrabaugh v. United States*, 611 F.2d 211, 218 (7th Cir. 1979).

ARGUMENT

I. A per se rule prohibiting reliance on counsel as a defense for the imposition of a late filing penalty would render the statutory language of "not due to willful neglect" meaningless, and such a rule must be rejected.

The government is requesting that this Court rule as a matter of law that reliance upon counsel can never constitute "reasonable cause" for the late filing of a tax return. Such a ruling would impose an automatic liability upon a taxpayer in circumstances where he did not act

willfully[9] and may not even have been negligent.[10] The imposition of such a standard of care is contrary to the plain directive of the statute which requires that the failure to timely file a return also be "not due to willful neglect." This additional language in the statute must be there for a purpose, and accordingly some meaning must be ascribed to it. The Court in construing statutes must look to the statute as a whole and not just to a particular clause. *Stafford v. Briggs*, 444 U.S. 527, 535 (1980), citing *Brown v. Duchesne*, 19 How 183, 194, 15 L.Ed. 595 (1857).

The government's position totally ignores the willful neglect language, and such an interpretation and analysis is improper. *Constanzo v. Tillinghast*, 287 U.S. 341, 345 (1932), citing *Brown v. Duchesne*, 19 How 183, 15 L.Ed. 595 (1857); and *Pollard v. Bailey*, 20 Wall 520, 525, 22 L. Ed. 376 (1875). What the government is attempting to do is give §6651 such a construction that it imposes a virtual absolute liability in many, if not all, cases of late filing. This would be contrary to the manifest intent of Congress. Automatic denial of a relief because the claim is based upon reliance on counsel would not be consistent with the Congressional mandate. *Rohrabaugh v. United*

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[9]The government in its brief (p. 27) virtually admits that a taxpayer's lack of business experience coupled with an ignorance of the filing deadline indicates that he would not have acted willfully in neglecting to file on time. Mr. Boyle did not act willfully, as there is nothing in the record to indicate that Mr. Boyle was experienced in these matters or knew the filing deadline as the District Court found and the Seventh Circuit noted (Pet. App. 1a, *et seq.*).

[10]Actually the government at p. 21 of its brief further concedes that Boyle may not have even been passively negligent.

States, 611 F.2d 211, 219 (7th Cir. 1979). If Congress desired they would have written the statute so that a penalty would be due and payable without regard to the circumstances. *Rohrabaugh v. United States*, 611 F.2d 211, 218 (7th Cir. 1979).

Essentially the government wants the scope of the statute narrowed so that the benefits available to taxpayers under it are either restricted or eliminated. They are asking this Court to redefine the type of conduct required of a taxpayer under the statute. It is not the function of this Court to assume such responsibility, as Mr. Justice Powell stated in *United States v. Byrum*, 408 U.S. 125 at p. 135 (1972): "When a principle of taxation requires re-examination, Congress is better equipped than a court to define precisely the type of conduct which results in tax consequences."

The principle advocated by the government is one Congress should address and change if they find it necessary. This Court should not be asked to determine when a penalty should be imposed upon a taxpayer.

A. Policy arguments as advanced by the government are not sufficient reasons to alter plain language of statute.

In attempting to justify its request to rewrite the statute under consideration, the government advances what it calls sound considerations of tax policy (Pet. Brief, p. 32). Essentially what it is saying is that the revenue collecting ability of the government would be enhanced by a change in the law. While this is most likely true, that is a consideration for Congress and not this Court. This Court cannot simply rewrite the statute because it believes (or the government believes) that it

could be improved upon. *United States v. Calamaro*, 354 U.S. 351 (1957). The argument of public policy as advanced by the government cannot be given any weight in this case.

Mr. Justice Blackmun writing for this Court in *Dawson Chemical Co. v. Rohm & Hass Co.*, 448 U.S. 176 (1980) at p. 220-1: "Since our present task is one of statutory construction, questions of public policy cannot be determinative of the outcome unless specific policy choices fairly can be attributed to Congress itself."

If there was any policy choice that can be said to have been made, it is the exact opposite of the one requested by the government.

The government conceded in its brief (p. 11) that it had not discovered any legislative history on which to rely. There is simply nothing in the record to indicate that Congress intended to enact a statute imposing absolute liability on taxpayers in circumstances similar to those as present in this case. Rather the opposite result was intended by Section 6651 and its predecessors. *Orient Investment & Finance Co. v. Commissioner*, 166 F.2d 601, 604 (D.C. Cir. 1948).

When Congress passed Section 6651 the concept of reliance on counsel as reasonable cause was firmly imbedded in judicial law. (See cases cited and further discussion at p. 23 of this brief.) The main purpose of passing Section 6651 in 1954 was to allow for a uniform gen-

eral rule for all tax returns.[11] Congress could have passed a much more rigid rule (being one similar to that which the government now seeks to impose), but they did not.

The construction of §6651 requested by the government would place a higher duty and standard of care on a taxpayer than was intended by Congress. Although §6651 may be incongruous,[12] any doubt as to its meaning or scope must be resolved in favor of the taxpayer and not the government. *Gould v. Gould*, 245 U.S. 151, 153 (1917); *American Net & Twine Co. v. Northington*, 141 U.S. 468, 474 (1904); *Benziger v. United States*, 192 U.S. 38, 55 (1904); *Luben Industries, Inc. v. United States*, 707 F.2d 1037 (9th Cir. 1983).

We are not asking this Court to enlarge upon the benefits granted to a taxpayer under the statute; but we are objecting to a substantial alteration of its meaning as exemplified by the government's request for a per se rule. An absolute standard cannot be imposed by a penalty statute that requires willful neglect upon the part of a taxpayer.

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[11]The general House and Senate reports on Section 6651 indicate that the purpose of the changes to existing law was to provide a uniform general rule applicable to all tax returns and not just income tax returns. Furthermore, prior law required the filing of a return before reasonable cause for late filing would be considered a defense. Section 6651 removed this requirement. Therefore, Section 6651 broadened available relief to taxpayers. 1954 U.S. Code Cong. and Adm. News, p. 4566, 5240.

[12]The words "reasonable cause" and "willful neglect" are inconsistent with one another. At the very least there is an attempt to modify the ordinary meaning of "reasonable." See Judge Posner's comment at pp. 18 and 19 of this brief.

B. A tax penalty is punitive in nature and should not be imposed upon innocent or negligent behavior. Only willful behavior should be subject to punishment.

The imposition of a penalty in this case is based upon an unintentional mistake or clerical error not even committed by the taxpayer.[13] Is it appropriate to impose a penalty upon a taxpayer where there are no facts to support any inference that he consciously, intentionally, or by design sought to avoid his obligations? It is not, and punishment should be invoked only for willful conduct under §6651. A penalty is a means of punishment. *United States v. Childs*, 266 U.S. 304, 307 (1924). It is punitive in nature.[14] Mr. Justice Black in *Simonson v. Granquist*, 369 U.S. 38 (1962), succinctly characterized a tax penalty where he said at p. 40-1:

> Tax penalties are imposed at least in part as punitive measures against persons who have been guilty of some default or wrong. [citing *United States v. Childs*, 266 U.S. 304 (1924)]

It is not the purpose of the law nor the intention of Congress to punish innocent errors. Such a position would be contrary to natural justice: *Orient Investment & Finance Co. v. Commissioner*, 166 F.2d 601, 603 (D.C. Cir. 1948); and the Court in *Orient* noted, "in the very teeth of the language of *Spies v. United States*, 317 U.S. 492 (1943)," where the Court at 371 U.S. 492, at p. 496 said:

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[13]As discussed elsewhere in this brief, there are no facts to suggest that the taxpayer willfully neglected to file the return on time. In fact, it is debatable whether he was even negligent.

[14]The charging of EIGHTY percent interest is punitive in nature. At the very least it is astronomical as the Court in *Rohrabaugh v. United States*, 611 F.2d 211, 218 (7th Cir. 1979), suggested could happen.

> It is not the purpose of the law to penalize . . . innocent errors made despite the exercise of reasonable care. Such errors are corrected by the assessment of the deficiency of tax and its collection with interest for the delay.

The Court in *Hatfried, Inc. v. Commissioner*, 162 F.2d 628 (3rd Cir. 1947) at p. 632, said:

> . . . the penalties imposed under the revenue laws were designed to attach to conduct of a taxpayer 'which is intentional, or knowing, or voluntary, as distinguished from accidental'* as evidenced by the words in Section 291 'and not due to willful neglect.'
>
> *citing *United States v. Murdock*, 290 U.S. 389, 394 (1933).

Both *Oriest* and *Hatfried* discussed the willful neglect language of §291(a) of the Internal Revenue Code, which section was the predecessor section to §6651 and contained substantially similar language (Pet. Brief, p. 11). Other courts in construing §6651 have failed to adequately address and interpret this language. However, an examination of analogous statutes indicates that an approach similar to that in *Oriest*, *supra*, and *Hatfried*, *supra*, should apply in construing the meaning of "willful neglect" under §6651.

This Court and other courts have consistently required more than mere negligence in assessing penalties under § 6672 of the Internal Revenue Code, a part of which is set forth in Appendix A of this brief. "Willful," under § 6672 of the Internal Revenue Code which seeks to impose a penalty for failure to pay certain taxes, has by the great weight of judicial authority required more than mere negligence. *Kalb v. United States*, 305 F.2d 506, 511 (2nd Cir. 1954), cert. denied, 421 U.S. 479 (1954). (Conduct

amounting to no more than negligence is not willful for purposes of § 6672, citing *Dudley v. United States*, 428 F.2d 1196, 1200 (9th Cir. 1970).) *Monday v. United States*, 421 F.2d 1210, 1216 (7th Cir. 1970), cert. denied, 400 U.S. 821 (1970). (Defining "willful action" under § 6672 as "voluntary, conscious, and intentional as opposed to accidental.") *Burden v. United States*, 486 F.2d 302 (10th Cir. 1973), cert. denied, 416 U.S. 904 (1973). ("Willfully" as used in § 6672 means a voluntary, conscious, and intentional decision.)

Although this Court has not directly construed or ruled upon the meaning of "willful neglect" under Code Section 6651, we submit that most of its members have clearly recognized that "willful" connotes more than negligence in other statutes. In *Slodov v. United States*, 436 U.S. 238 (1978), Mr. Justice Brennan for the Court, in referring to § 6672, at p. 254, said:

> The fact that the provision imposes a 'penalty' and is violated only by a 'willful failure' is itself strong evidence that it was not intended to impose liability without personal fault.

In the same decision Mr. Justice White in dissent noted at p. 265:

> . . . the term 'willful' in our jurisprudence, particularly in connection with tax matters, normally connotes nothing more than a conscious act or omission. . . .

We, therefore, suggest that this Court and others have clearly recognized the distinction between mere negligence and willful conduct; and there is not any basis to construe § 6651 any differently. If the Court were to rule as the government suggests, it would be ignoring the plain meaning and requirement of the statute. Certainly

in terms of equity or fairness it has traditionally been necessary to show some type of willful conduct as opposed to an innocent mistake before punishment is involved. The "penalty sword should not be wielded without adequate regard to the circumstances of the case." *Rokrubough v. United States*, 611 F.2d 211, 219 (7th Cir. 1979). The imposition of a penalty of EIGHTY percent interest per annum is more than a sword; it is a howitzer.

C. The Treasury regulation is incompatible with the Code section which it purports to explain and should be disregarded.

The government relies in its argument on Treasury Regulation § 301.6651-1(C)(1) as a basis to support its contention that a "reasonable-man" test be applied under §6651 (Pet. Brief 8, 12, 27).[15] The regulation totally ignores a portion of § 6651 in that it removes the question of "willful neglect" from consideration. The regulation converts the standard to one of ordinary negligence[16] and thus effectively removes from consideration any question of willful neglect. The statutory language suggests a test of more than ordinary negligence, if some meaning is to be given the words "willful neglect." Judge Posner noted the distinction in his dissent stating, "Although in making

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[15]The government makes great effort to point out that the regulation had not previously been challenged. Perhaps they recognize its inherent incongruity. Judge Cudahy in his dissent in *Fleming v. United States*, 648 F.2d 1122, 1127 (7th Cir. 1981), noted that the phrases "reasonable cause" or "ordinary business care and prudence" would "seemingly encompass the reliance of a taxpayer on his attorney in any legal matter. . . ." The government's position is just the opposite.

[16]Judge Posner in his dissent in this case noted that under the regulation "willful neglect" means "negligence." (Pet. App. 13a).

'willful neglect' the opposite of 'reasonable cause' the statute might seem to have *modified the ordinary meaning of 'reasonable'*. . . ." (emphasis supplied) (Pet. App. 12a).

The government suggests that a two-prong test applies. If a person passed the "reasonable-man" or "ordinary-business-care" test, it is difficult to understand under what circumstances he could be found to be guilty of "a willful neglect" for failing to file his return. To our knowledge there are no cases in which such circumstance has existed, as it is a virtual impossibility. The regulation impermissibly redefines the standard of care required of a taxpayer and eliminates any consideration of willful neglect. The test as proposed by the government would be more difficult under a *per se* rule. If the statute did not contain the words "willful neglect," we inquire as to what the test would be. It is difficult to imagine that it would be any stricter.

The regulation should be in harmony with the statutory language. Otherwise, it must not be given any effect. *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 25 (1982); *National Muffler Dealers Assn., Inc. v. United States*, 440 U.S. 472, 477 (1979). It is our understanding that the aforesaid regulation is one which was promulgated by the Commissioner under his general authority,[17] and, therefore, this Court "owes the interpretation less deference than a regulation issued under a specific grant of authority. . . ." *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982), citing *Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981). While we acknowledge that some deference be given to the regulation, it is still a

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[17]Internal Revenue Code of 1954 (26 U.S.C.) §7805(a).

proper matter for this Court to analyze same. *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982); *United States v. Carturight*, 411 U.S. 546, 550 (1973).

Due to the fact that the Treasury regulation places a higher standard of care upon a taxpayer than otherwise required by the statute, it should be rejected by this Court and not be given any weight in support of the government's position.

II. Reliance on counsel as reasonable cause is justified by the facts of this case and should not be rejected here or rejected as a matter of law.

As discussed earlier in this brief, Congress did not adopt a statute providing for an absolute rule of liability and, in fact, desired to avoid possible hardships. *Orient Investment & Finance Co. v. Commissioner*, 166 F.2d 601, 604 (D.C. Cir. 1948), discussing Section 291(a). The question then becomes, "What type of conduct is necessary to excuse the imposition of a late filing penalty?" The elements that must be present are a question of law. Whether or not they are present in a given situation is a question of fact. *Hatfried, Inc. v. Commissioner*, 162 F.2d 638, 635 (3rd Cir. 1947); *Giesen v. United States*, 369 F.Supp. 33, 35 (W.D.W. 1973). There does not appear to be any question as to the facts in this case, and the government in the District Court and Court of Appeals did not suggest otherwise (Pet. App. 2a). Since the government apparently concedes that the facts of this case are favorable to the taxpayer, it spends much of its discussion upon the activities of the attorney. Even in the question for review, the government does not mention *any* (emphasis added) negligence on the part of the taxpayer but refers *only* (emphasis added) to the attorney's negligence. The

proper focus of attention should be on the taxpayer, as it is his conduct that is determinative of the existence of reasonable cause and not that of his attorney. *Daley v. United States*, 480 F.Supp. 808, 811 (D.N.D. 1979). The negligence of the attorney can neither be imputed to the taxpayer or exonerate the taxpayer. *Haywood Lumber & Mining Co. v. Commissioner*, 178 F.2d 769, 771 (2nd Cir. 1950); *Daley v. United States*, 480 F.Supp. 808, 811 (D.N.D. 1979). Therefore, what Mr. Keyser's actions were in this case[13] are of no concern to the issues to be decided by this Court. Whatever standard this Court deems appropriate is one which is personal to the taxpayer. See *Haywood Lumber & Mining Co. v. Commissioner*, 178 F.2d 769, 771 (2nd Cir. 1950), commenting on § 291 of the Internal Revenue Code.

The Seventh Circuit found that Mr. Boyle had exercised ordinary care and prudence and that the operative facts in this case were virtually identical to those in *Rohrabaugh v. United States*, 611 F.2d 211 (7th Cir. 1979), where in its opinion in this case, quoting from *Rohrabaugh*, said:

> Here an inexperienced taxpayer wholly unaware of the time requirements for filing a federal estate tax return selected a competent tax expert, supplied him with all the necessary and relevant information, requested him to prepare all necessary documents including tax returns, relied upon his doing so, but nevertheless maintained contact with him from time to time during the administration of the estate. 611 F.2d at 214. [Pet. App. 3a-4a.]

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[13] Which, in any event, was only a simple, unintentional mistake due to a clerical error.

Mr. Boyle did everything a layman could be expected to do as Judge Coffee noted in his concurring opinion (Pet. App. 9a). Judge Coffee further noted that Boyle was "not even passively negligent" (Pet. App. 10a). There is nothing inherently unreasonable about a layman relying on his counsel to handle his legal affairs. Under the government's theory an otherwise reasonably prudent taxpayer would in effect be penalized for consulting a legal adviser. Such a rationale is contrary to sound reasoning as the Court in *Haywood Lumber & Mining Co. v. Commissioner*, 178 F.2d 769 at p. 771 (2nd Cir. 1950), so noted:

> To impute to the taxpayer the mistakes of his consultant would be to penalize him for consulting an expert; for if he must take the benefit of his counsel's or accountant's advice cum onere, then he must be held to a standard of care which is not his own and one which, in most cases, would be far higher than that exacted of a layman.

The government by hindsight analysis and highly technical reasoning would in effect defeat the very purpose of consulting or engaging an expert. To have required Mr. Boyle to check with his attorney "every step of the way" is unrealistic, illogical, and contrary to common sense. If a taxpayer has no knowledge that anything is wrong, he should not have any duty to "check up on his attorney." *Gray v. United States*, 453 F.Supp. 1356, 1361 (W.D.Mo. 1978). If one goes to a doctor, he is not expected to verify or check upon every procedure of treatment suggested by the doctor. Instead he could reasonably and naturally rely upon the expertise of the doctor, for that is the reason he consulted him. The same logic should apply when one consults an attorney. As long as there are no facts brought to the attention of a person that his counsel is

neglecting his affairs and the person is otherwise exercising ordinary care in his affairs, he should be entitled to rely on his counsel.

There is nothing in the record to suggest a contrary finding upon the facts. Therefore, the government is compelled to request a dramatic reversal of a point of law that has had long-standing judicial acceptance.

A. Reliance on counsel as reasonable cause to excuse late filing penalties is a concept deeply imbedded in judicial law, and there is not any justification to warrant a sudden rejection of that principle.

The concept of good-faith reliance on counsel is not a novel one and has been accepted by many courts. See *Giesen v. United States*, 369 F.Supp. 33, 34 (W.D.W. 1973), citing cases.[*] The government now suggests that such reasoning is "bad law" and should be rejected. As a basis to justify this reversal of a long-standing concept, the government further suggests that several circuits have adopted a *per se* rule such as the one which it asks this Court to adopt. We dispute this contention, as no court has *expressly* (emphasis added) adopted this rationale. Space limitations prevent us from examining each decision completely. However, we are compelled to comment on the government's almost incredible assertion that the Eighth Circuit has rejected the defense of reliance on counsel as a matter of law (Pet. Brief p. 22). The Eighth Circuit in two of its recent decisions on this question specifically noted that it had not adopted a *per se* rule. In

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[*]The government acknowledges that the reliance-on-counsel defense has been accepted by many courts. See cases cited in Pet. Brief, pp. 22, 23, 24, 26.

B. The effect of a per se rule could result in inequitable operation of §6651 and impose hardships on innocent conduct.

The narrow exception which Mr. Boyle seeks to have applied to his case, and as a general proposition remain a portion of the tax law, is necessary to distinguish the myriad circumstances that could arise when a tax return is filed late. Section 6651(a) does not impose an absolute liability upon a taxpayer, and it is appropriate to distinguish the conduct of taxpayers on a case-by-case basis. Under the per se rule it would not matter if a taxpayer promptly filed his return after he discovered his delinquency. He might as well wait months or even years before filing since the penalty under § 6651 would be the same. It would not matter if he neglected the estate or made a good-faith effort to discharge his duties. Under a per se rule he would be treated the same.

Courts have not had any great difficulty in distinguishing the conduct of taxpayers. The facts of a particular case can quite clearly indicate whether a taxpayer willfully neglected his duty to file a return. It does not take any strained interpretation or analysis to recognize the difference between a taxpayer who acts in good faith and discharges his duties responsibly and one who neglects his duties and further persists in failing to file a return even after knowledge of its dute date. See *United States v. Kroll*, 547 F.2d 393 (7th Cir. 1977). (Return not filed until after nine months after notice of delinquency.) *Boeving v. United States*, 650 F.2d 493 (8th Cir. 1981), rev'g. 493 F.Supp. 665 (E.D. Mo 1980) (Delay of seven months.) *Crouse v. United States*, 711 F.2d 102 (8th Cir. 1983). (Return filed twenty-three months late.) *Millette*

Smith v. United States, 702 F.2d 741 at p. 743 (9th Cir. 1983), the Court said:

> Although these decisions [referring to *Estate Of Lalakei v. Commissioner of Internal Revenue Service*, 638 F.2d 65 (9th Cir. 1981), and *Boeving v. United States*, 650 F.2d 493 (8th Cir. 1981)] do not establish a rule of law that a personal representative's reliance on counsel can never constitute cause under Section 6651(a)(1) for failing to file a timely return, Smith has not demonstrated any facts that distinguish the circumstances in this action from those present in *Boeving* and *Estate of Lalakei*.

Estate of Kerber v. Commissioner, 717 F.2d 454 (9th Cir.), petition for cert. pending No. 83-1038, (referred to the above citation and did not expressly adopt a per se rule).

We urge this Court to examine the other cases cited by the government as "per se rules," and we believe that this Court will not find any express language to that effect.

The adoption of a per se rule would have a significant impact upon the potential tax and penalty consequences of individual taxpayers. This Court should defer to Congress to make such a change. Mr. Justice Powell, writing for this Court in *United States v. Byrum*, 408 U.S. 125 at p. 135 (1972), stated:

> Courts properly have been reluctant to depart from an interpretation of tax laws which has been generally accepted when the departure could have potentially far-reaching consequences.

The government should ask Congress to make the change it wants, as it is the proper body to make substantive changes in tax law.

& Associates, Inc. v. Commissioner, 594 F.2d 121 (5th Cir. 1979), cert. denied, 444 U.S. 899 (1979). (Return filed twenty-six months late.)

Should a taxpayer such as Mr. Boyle or the one in *Rohrabaugh* who has actively participated in the administration of the estate be treated the same as one who has not? Judge Coffee, concurring in this case:

> I do not know what else a taxpayer can be expected to do when he retains a professionally trained tax counselor, makes repeated calls to check on the progress of the tax returns and is advised that everything will be taken care of in plenty of time. [Pet. App. 9a]

Under the per se rule it would not matter what Mr. Boyle did, and he would be in the same category as those taxpayers who did in fact "abandon the ship." See *Estate of Lammerts v. Commissioner*, 456 F.2d 681 (2nd Cir. 1972), per curiam, (no evidence of any inquiry into progress of estate). *Estate of Lillehei v. Commissioner*, 638 F.2d 65 (8th Cir. 1981), per curiam, (no requests or inquiries, simple passivity). *Estate of Duttenhofer v. Commissioner*, 410 F.2d 302 (6th Cir. 1969), per curiam aff'g. 49 T.C. 200 (1967), (no inquiries). *Estate of Geraci v. Commissioner*, 502 F. 2d 1148 (6th Cir. 1974), aff'g, 32 C.C.H. Tax Ct. Mrm. 424 (1973), (no evidence of inquiries).

In addition to the obvious inequities that could result under a per se rule, there is an additional potential element of hardship. The government seeks to soften this possibility, as does Judge Posner, by a malpractice rationale. Such a rationale assumes that the taxpayer would always be successful. The malpractice rationale is a novel legal reason to support a desired result. The government cites no authority in tax cases or any cases to support such

an analysis. The only possible reason for advancing such an argument is to direct attention from the innocent taxpayer and focus it on a different target. That is understandable, since under a per se rule an innocent taxpayer who has done nothing wrong could suffer a hardship not intended by Congress.

The government assumes that it would be a simple matter to "collect" from the attorney. Many attorneys without question or argument assume full responsibility for their mistakes—but what of those who do not or otherwise cannot? There are many estates which could easily generate taxes in hundreds of thousands of dollars; and, thus, the imposition of a penalty could involve very significant amounts of money.[20] What if the attorney did not have the resources to pay same? Or what if the attorney otherwise refused to pay same and required a party to incur still additional legal expense to collect same? And could he necessarily be guaranteed full recovery?[21]

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[20]Assuming a taxable estate of $1,000,000 and an exemption of $325,000 which is currently allowed, the tax would be $249,500 assuming a credit for state death taxes did not apply. If the return was unintentionally filed four months and one day late, the penalty would be $62,375. The effective annual interest rate would be over 75 percent.

[21]Under the government's rationale, the taxpayer would be considered to have failed to exercise ordinary business care and thus presumably would be negligent. Since his negligence was at least in part a factor in the imposition of a penalty, could he be assured of a full recovery? Many state laws would theoretically reduce recovery under a comparative negligence theory. We do not think this would be equitable; however, it could well happen.

In any event, the taxpayer would have to incur additional legal expense which generally would not be recoverable; and, even if he fully prevailed on the negligence question, he would not be made whole.

This scenario would be a very real possibility if the government's per se rule was adopted. And what did the common ordinary layman do? In this case and in *Rokrabaugh*, we submit that the taxpayer did nothing wrong or unreasonable. He may not even have been negligent. But under the per se rule he or she could be responsible for paying thousands of dollars for a simple clerical error of another person. A narrowly drawn exception is warranted to prevent inequitable results and hardships where the facts so demand it. It will not open "Pandora's box" or create a flood of lawsuits, as it would be foolish to *assume* (emphasis added) judicial relief would be forthcoming, as Judge Campbell for the Court of Appeals in this case noted (Pet. App. 6a). Even Judge Posner said, "Let us by all means, in the spirit of *Rokrabaugh*, allow an exception. . . ." (Pet. App. 15a).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

Treas. Reg. §301.6651-1(e)(1):

> (e) Showing of reasonable cause. . . . If the district director, the director of the service center, or, where applicable, the Regional Director, Bureau of Alcohol, Tobacco and Firearms, determines that the delinquency was due to a reasonable cause and not to willful neglect, the addition to the tax will not be assessed. If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time, then the delay is due to a reasonable cause. A failure to pay will be considered to be due to reasonable cause to the extent that the taxpayer has made a satisfactory showing that he exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship (as described in §1.6161–(b) of this chapter) if he paid on the due date. . . .

Internal Revenue Code of 1954, 26 U.S.C.:

> Section 6672. *Failure to collect and pay over tax, or attempt to evade or defeat tax.*
>
> (a) General rule. Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

REPLY

BRIEF

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No. 83-1266

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT W. BOYLE, EXECUTOR OF
THE ESTATE OF MYRA W. BOYLE, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. The late-filing penalty of Section 6651(a)(1) applies unless it is shown that the taxpayer's failure to file on time "is due to reasonable cause and not due to willful neglect." As noted in our opening brief (at 11, 27), Section 6651(a)(1) by its terms sets forth a two-pronged test. A delinquent taxpayer seeking to avoid the penalty must demonstrate both "the existence of reasonable cause *and* the absence of willful neglect." *Rubber Research, Inc.* v. *Commissioner*, 422 F.2d 1402, 1407 (8th Cir. 1970) (Blackmun, J.) (emphasis added). A taxpayer satisfies the "reasonable cause" prong of the test only if he shows that he "exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time." Treas. Reg. § 301.6651-1(c)(1). This understanding of the overall statutory and regulatory scheme was accepted by the

Seventh Circuit below (Pet. App. 4a-5a), and has been accepted, as far as we know, by every other court that has considered the question.

Respondent offers a different and revolutionary interpretation of the statutory scheme. In his view, the addition to the tax for late filing "should be invoked only for willful conduct" (Br. 15). A delinquent taxpayer on this theory can avoid the penalty so long as he proves himself innocent of "willful neglect" (*id.* at 9, 10-18). The notion that "there is a two-prong test," respondent says, "is in fact an impossibility" (*id.* at 8), since the terms "reasonable cause" and "willful neglect" are assertedly "inconsistent with one another" (*id.* at 14 n.12). Although Congress in drafting Section 6651 used the phrases "due to reasonable cause" and "not due to willful neglect" conjunctively, respondent asserts that the statute is "incongruous" (Br. 14, 18 n.15). The presence in the statute of the words "willful neglect," in respondent's view, "indicates that Congress intended something beyond mere negligence" (Br. 7) as a predicate for imposition of the late-filing penalty.

Respondent's proposed construction of Section 6651 is both unprecedented and incorrect. The courts have repeatedly held that a taxpayer seeking to avoid the penalty must show, not only the absence of "willful neglect," but also the presence of "reasonable cause." See U.S. Br. 11 (citing cases). That, after all, is the meaning of the conjunction "and." The relevant statutory language has not changed since 1916. See U.S. Br. 11-12 n.4. Respondent would simply read the phrase "due to reasonable cause" out of the statute, and his proposed construction is thus at odds with the well-established canon that a statute should be given "a reasonable construction which gives effect to all of its provisions." *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

Read literally, moreover, the statute makes perfect sense. Congress evidently determined that a delinquent taxpayer should be permitted to escape liability for a late filing only if he shows that his delinquency is excusable both in a subjective sense ("not due to willful neglect") and in an objective sense ("due to reasonable cause"). There is nothing odd or "incongruous" about that determination.

2. Respondent also contends (Br. 7, 18-20), for the first time in this litigation, that the Treasury Regulation implementing Section 6651(a)(1) is invalid.[1] As noted above, Treas. Reg. § 301.6651-1(c)(1) provides that a late filing is due to reasonable cause only "[i]f the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time." Respondent says that the Regulation improperly "converts the [statutory] standard to one of ordinary negligence and thus effectively removes from consideration any question of willful neglect" (Br. 18 (footnote omitted)).

Respondent's challenge to the Regulation is wrong for the same reason that his proposed construction of the statute is wrong. The statute sets forth a two-pronged test. While the portion of the Regulation containing the language quoted above elaborates upon the term "reasonable cause," it also specifically refers to the absence of willful neglect as an additional criterion.[2] The Regulation's definition of "reasonable cause," moreover, is unexceptionable. It

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[1] Respondent did not challenge the validity of the Regulation either in his claim for refund (J.A. 12) or in the proceedings below. The argument accordingly should not be considered by this Court. See, *e.g.*, *Angelus Milling Co.* v. *Commissioner*, 325 U.S. 293, 295-299 (1945); *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272 (1931).

[2] Treas. Reg. § 301.6651-1(c)(1) ("If the district director [of Internal Revenue] * * * determines that the delinquency was due to a reasonable cause and not to willful neglect, the addition to the tax will not be assessed.").

tracks the standard judicial definition of "reasonable cause" in tax cases. See, *e.g.*, *Southeastern Finance Co.* v. *Commissioner*, 153 F.2d 205 (5th Cir. 1946). It has read substantially the same way since 1918.[3] As this Court has frequently observed, "Treasury [R]egulations • • • long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Helvering* v. *Winmill*, 305 U.S. 79, 83 (1938).

Nowhere in his brief does respondent contend that his activities with respect to the estate tax return amounted to "ordinary business care and prudence" within the meaning of Treas. Reg. § 301.6511-1(c)(1). Since the validity of that Regulation cannot seriously be questioned, respondent lacked "reasonable cause" for his late filing and the Commissioner thus properly assessed the late-filing penalty against him.

3. Respondent contends that "[a] penalty is a means of punishment" and that a taxpayer should be punished only if he acts willfully, that is, if "he consciously, intentionally, or by design [seeks] to avoid his obligations" (Br. 15). But while we speak colloquially of a "late-filing penalty," Section 6651(a) in terms imposes an "addition to the tax." The distinction is not merely a matter of nomenclature, but reflects a congressional design under which Section 6651 "is not primarily punitive in nature, but is an attempt to protect the revenue." *Logan Lumber Co.* v. *Commissioner*, 365 F.2d 846, 854 n.18 (5th Cir. 1966) (quoting *Plunkett* v. *Commissioner*, 118 F.2d 644, 650 (1st Cir. 1941)). Obviously, if there were no disincentive to filing tax returns late, taxpayers in effect could borrow money from the government

[3]See, *e.g.*, Treas. Reg. 33, art. 54 (1918); Treas. Reg. 74, art. 1211(b) (1929); Treas. Reg. 77, art. 1211(b) (1933); Treas. Reg. 86, art. 291-1(b) (1935); Treas. Reg. 103, § 19.291(b) (1940).

at will. And since the "addition to the tax" is not designed to punish, the fact that a delinquency "was due to inadvertence does not relieve the [taxpayer] from [its] imposition" (*Plunkett*, 118 F.2d at 650). "If every taxpayer who forgot to file a return or was too busy to file a return escaped the penalty for failure to file, our tax system would soon collapse" (*Logan Lumber Co.*, 365 F.2d at 854).

Respondent thus errs, in support of his proposed construction of Section 6651, in relying (Br. 16-18) on cases construing Code Section 6672. That Section imposes a civil "penalty" on a withholding agent who "willfully fails to collect [the] tax" or "willfully attempts in any manner to evade or defeat [the] tax." As respondent properly notes (Br. 16), the courts "have consistently required more than mere negligence" in cases arising under Section 6672, since Section 6672 by its terms applies only if the withholding agent acts "willfully." Section 6651, by contrast, imposes an addition to the tax unless the delinquency "is due to reasonable cause and not due to willful neglect." The words "reasonable cause" do not appear in Section 6672.

4. Respondent repeatedly characterizes the Section 6651(a)(1) addition to the tax as "interest" (Br. 3 & n.2, 15 n.14, 27 n.20), calculates that the addition works out to an "effective annual interest rate [of] over 75 percent" (*id.* at 27 n.20), and concludes that so "astronomical" an interest charge must necessarily be designed to be "punitive in nature" (*id.* at 15 n.14). Section 6651, however, does not provide for interest. Interest on delinquent taxes is provided for in Section 6601(a). Interest was assessed against the Boyle estate, at the then-prevailing annual rate of six percent, and was paid; no question about it is presented here. See U.S. Br. 5 n.3. Section 6651 is not designed to compensate the government for the use of its money, but to create an incentive for payment of the tax when due. It reflects a congressional judgment that the government is entitled to

receive its revenue promptly, not just to receive the time value of its money on whatever payment schedule a delinquent taxpayer elects. Respondent may believe that the incentive Section 6651 creates operates with undue harshness when ignored, but that is an argument properly addressed to Congress.

5. After we filed our opening brief in this case, the Fourth Circuit decided *Willis* v. *Commissioner*, 736 F.2d 134 (1984). Relying chiefly on the decision below and on the Seventh Circuit's earlier decision in *Rohrabaugh* v. *United States*, 611 F.2d 211 (1979), the Fourth Circuit expunged a late-filing penalty in circumstances analogous, but not identical, to those involved here. We bring the case to the Court's attention to illustrate the potential reach and extrapolative effects of the Seventh Circuit's rationale.[6]

The taxpayer in *Willis* had his individual income tax return prepared by an accountant (736 F.2d at 138). Eighteen days before the return was due, the taxpayer signed it and instructed the "trusted secretary-comptroller" of his corporation to draw a check and mail the return to the IRS (*id.* at 140). The agent "mislaid the tax return and inadvertently failed to mail it to IRS" on time (*ibid.*). The Fourth Circuit, reversing the district court, held that the taxpayer's delinquency was "due to reasonable cause" (*ibid.*).

In holding that the taxpayer could escape the late-filing penalty by relying on his agent's negligence, the Fourth Circuit committed the same error that the Seventh Circuit committed below. The *Willis* decision, moreover, illustrates the alarming breadth of the Seventh Circuit's "reliance on an agent" rationale. As the facts of *Willis* show, that rationale is potentially available regardless of whether the return

[6]We did not petition for certiorari in *Willis* because the Section 6651 issue there involved entailed an additional tax liability of about $400.

is an income tax return or an estate tax return, regardless of whether the taxpayer knows the return's due date, and regardless of whether the agent is a lawyer. If that is the law, Section 6651 will become either inequitable or meaningless, for anyone with enough money to hire somebody else to prepare his tax return for him — or to go to the post office for him — will be able to escape the congressionally-ordained consequences of a negligent late filing. Where a tax return is delinquent, the IRS is entitled to collect the "addition to the tax" for which Congress provided. It is then up to the taxpayer and his agent to determine between themselves which of them shall bear the cost.

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

Respectfully submitted.

Rex E. Lee
Solicitor General

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